CABLE TELEVISION REGULATION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2172

TO AMEND THE COMMUNICATIONS ACT OF 1934

APRIL 26, 27, AND 28, 1982

Part 2

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CABLE TELEVISION REGULATION

MONDAY, APRIL 26, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:01 a.m., in room 235, Russell Senate Office Building, Hon. Barry Goldwater (chairman of the subcommittee) presiding.

Staff members assigned to these hearings: Christopher D. Coursen, staff counsel and Gordon I. Fink, minority professional staff member.

OPENING STATEMENT BY SENATOR GOLDWATER

Senator GOLDWATER. The meeting will come to order.

My introduction on March 4 this year of S. 2172, the Cable Telecommunications Act of 1982, represents the culmination of a process that began in 1979 when I introduced legislation that contained similar provisions. Extensive hearings were held on that bill, but no action was taken in the 96th Congress.

Last year the Commerce Committee considered a number of communications bills that were passed by the Senate. Among those was S. 898 which contained several cable television provisions. However, no hearings had been held on those particular sections in S. 898. Therefore, during the floor debates on that bill I objected to these provisions because of the commitments I had made that there would be no cable legislation without hearings. I also made it clear that I was not objecting to the substance of the cable provisions in S. 898. My amendment to delete those provisions was successful and they were stricken from the bill.

Now since that time the Commerce Committee held two field hearings on cable. The first was in Seattle, Wash., on January 18, 1982, chaired by Senator Packwood, and attended by Senator Gorton. The committee heard testimony from 10 witnesses.

The second hearing was in Albuquerque, N. Mex., on February 16, 1982, and was chaired by Senator Schmitt. He heard from 10 witnesses as well.

In addition, statements were received for the record from 18 other parties.

Much of the evidence accumulated during those hearings helped to formulate some of the provisions in S. 2172. This bill is the result of many, many months of study on the issues and is the first time that a comprehensive bill has been introduced on cable.

I want to make it very, very clear that all of us, the staff, myself, and the members of the committee, realize that we do not know a lot about cable. In fact, I do not think anybody knows an awful lot about it. We also realize that communications of all types, including videovision, will have radical changes day after day after day, and that, I might explain, is the reason we are not jumping on A.T. & T. and trying to legislate the problems that do not even exist today. We prefer in that area to wait and see what happens.

But on cable, I am very indebted to my committee staff. They have studied this subject as thoroughly as I think anybody can. I sincerely hope that through these 3 days of hearings some consensus can be reached among the interested parties for modifications in the bill where appropriate and necessary, so that we can move expeditiously to full Commerce Committee markup. It is my deep belief that it is in everyone's best interests—the cities, the cable industry, and others—to reach some accord and move this legislation forward. Perhaps then the House will act in a similar fashion, and meaningful legislation can be enacted into law. With everyone's help, I believe we can achieve that goal.

And finally, let me say that Senators Schmitt, Kassebaum, and Stevens have been added as cosponsors along with the original cosponsor, Senator Kasten.

So with those few remarks, these series of hearings that will go on for the next 3 days will start.

[The bill follows:]

II

97TH CONGRESS
2D SESSION

S. 2172

To amend the Communications Act of 1934.

IN THE SENATE OF THE UNITED STATES

MARCH 4 (legislative day, FEBRUARY 22), 1982

Mr. GOLDWATER (for himself and Mr. KASTEN) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

---

A BILL

To amend the Communications Act of 1934.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Cable Telecommunications Act of 1982".

(b) The Communications Act of 1934 is amended by inserting immediately after title V the following new title:

"TITLE VI—CABLE TELECOMMUNICATIONS ACT

"FINDINGS

"SEC. 601. The Congress hereby finds that—

"(1) cable systems are engaged in interstate commerce through the origination, transmission, distribution, and dissemination of broadband telecommunications services;

"(2) the expansion and development of cable telecommunications is of primary concern to the Federal Government;

"(3) it is necessary and appropriate for the Federal Government to establish and maintain a national policy for cable telecommunications to assure the evolution of cable as a medium in its own right; and

"(4) a national and uniform policy for cable is needed to prevent the emergence of conflicting regulation and to allow the growth and development of cable as a medium which will be responsive to and serve the needs and interests of the public.

"PURPOSES

"SEC. 602. The purposes of this Act are to—

"(1) create a jurisdictional framework which apportions the authority to regulate cable systems between the Federal Government and each of the several States of the United States; and

"(2) allow cable systems to compete in the marketplace with other providers of telecommunications services to the public.

"STATEMENT OF AUTHORITY

"SEC. 603. The provisions of this title shall apply as follows:

"(1) The Commission shall have jurisdiction and exercise authority with respect to cable systems solely as specified in this title. Commission jurisdiction under this title is exclusive and no other Federal or State instrumentality or agency or any political subdivision thereof shall make or establish rules or policies regarding the matters dealt with in this title.

"(2) Any cable system shall be subject to the provisions of this title and such orders, rules, or regulations as may be adopted pursuant thereto and any Federal rule, regulation, order, or standard applicable to cable systems shall, to the extent inconsistent with the provisions of this title, be null and void.

"(3) A State, instrumentality, agency, board, commission, or authority or any political subdivision thereof may adopt or continue in force any law, rule, regulation, order, or standard affecting cable systems, unless such law, rule, or regulation, or order or standard is inconsistent with the exclusive grants of authority under this title and is not forbidden to any governmental authority under this title.

"DEFINITIONS

"SEC. 604. For purposes of this title, the term—

"(1) 'basic service', 'basic cable service', or 'basic subscriber service' means the retransmission of broadcast signals and any other service as determined by a cable operator;

"(2) 'broadband telecommunications' means any receipt or transmission of electromagnetic signals over one or more coaxial cables or other closed transmission medium;

"(3) 'broadcasting' means telecommunications by radio intended to be received by the public, directly or by the intermediary of relay stations;

"(4) 'cable channel' or 'channel' means that portion of the electromagnetic frequency spectrum used in a cable system for the propagation of a radio, television, or other electromagnetic signal;

"(5) 'cable operator' or 'cable system operator' means any person or persons, or an agent or employee thereof, that operates a cable system, or that directly or indirectly owns a significant interest in any cable system, or that otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

"(6) 'cable service' means the retransmission of any television or radio broadcast signal, or program origination, for distribution by cable or any other closed transmission medium to multiple subscribers;

"(7) 'cable subscriber' means any person who receives radio, television, or other electromagnetic signals distributed or disseminated by a cable operator or a channel programer over a cable system;

"(8) 'cable system' means a facility or combination of facilities under the ownership or control of any person or persons, which consists of a primary control center used to receive and retransmit, or to originate broadband telecommunications services over one or more coaxial cables, or other closed transmission media, from the primary control center to a point of reception at the premises of a cable subscriber, but such term does not include a facility or combination of facilities that serves only to retransmit the television signals of television broadcast stations located within the market in which such facility is located, nor shall a common carrier subject to the provisions of title II of this Act be deemed to be a cable system solely by reason of receiving or transporting broadband telecommunications services in the ordinary course of its business as a common carrier;

"(9) 'channel programer' means any person or persons that lease, rent, or are otherwise authorized to use the facilities of a cable system for the origination of programing over a cable channel, and such term shall include a cable system operator to the extent that such operator, or person or persons under common ownership or control with such operator, is engaged in program origination;

"(10) 'closed transmission medium' or 'closed transmission media' means media having the capacity to transmit simultaneously electromagnetic signals over a common transmission path such as coaxial cable, optical fiber, wire, waveguide, or other such signal conductor or device;

"(11) 'origination' or 'program origination' means the use of a cable channel by a channel programer to create and distribute programs such as news, public affairs, entertainment, sports, educational, informational, and religious, but such term does not include carriage of radio or television broadcast signals by a cable operator;

"(12) 'person' means an individual, partnership, association, joint stock company, trust, corporation, or any governmental authority;

"(13) 'radio or television signal' means a signal or any radio or television broadcast station, domestic or foreign, operating on a channel regularly assigned to its community, which is receivable by the general public without charge;

"(14) 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information, by means of electromagnetic transmission, with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission;

"(15) 'telecommunications carrier' or 'carrier' means any person, including any government or quasi-government entity, which offers any telecommunications service or facilities used by any person to provide telecommunications services, except that a person engaged in broadcasting, or in providing any cable service, shall not, insofar as such person is so engaged, be deemed a carrier;

"(16) 'telecommunications service' means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities; and

"(17) 'United States' means the several States and territories, the District of Columbia, and the possessions of the United States.

"OWNERSHIP OR CONTROL OF CABLE SYSTEMS

"SEC. 605. (a) Except in the case of the antitrust laws of the United States and to the extent otherwise provided in subsections (b), (c), and (d) of this section, no executive agency of the United States, including the Commission, and no State or political subdivision or agency thereof, including a cable franchising authority, shall have the authority to prohibit, or otherwise regulate, the ownership of cable systems by any person.

"(b)(1) Notwithstanding the provisions of subsection (a) of this section, for the purpose of ensuring fair and equitable treatment of United States cable enterprises seeking access to markets in a foreign country, the Commission shall have authority to conduct inquiries and establish policies, rules, regulations, and requirements applicable to foreign persons from that country seeking access to domestic markets in the United States in connection with the construction, ownership, and operation of cable enterprises with a view to assuring that such United States cable enterprises are permitted access to such foreign markets upon terms and conditions which are reciprocal with the terms and conditions under which such foreign persons have access to domestic markets in the United States.

"(2) For purposes of this subsection, the term 'foreign persons' includes any individual who is not a citizen of the United States, any subsidiary (although established under the laws of the United States or any State thereof) of a corporation or other business entity which was established under the laws of a foreign country, any corporation or other business entity established under the laws of a foreign country, or any corporation or other business entity established under the laws of the United States or any State thereof, if 25 per centum or more of the capital stock or equivalent ownership is owned or controlled by an individual who is not a citizen of the United States or by a corporation or other business entity established under the laws of a foreign country, or any subsidiary of a corporation or other business entity established under the laws of a foreign country.

"(3) The Commission shall adopt such rules, regulations, policies, requirements, and procedures, and may impose such restrictions as it determines to be necessary or appropriate to carry out the provisions of this subsection.

"(c) Notwithstanding the provisions of subsection (a) of this section, a State or any political subdivision or agency thereof may not own or acquire an ownership interest in any cable system, unless such State, subdivision, or agency acquires such ownership or interest at not less than fair market value and not by condition of franchise unless the franchise provides for purchase at fair market value. In any case in which any such State, subdivision, or agency has or acquires any such ownership or interest in accordance with this subsection, such State, subdivision, or agency shall, in no case, own or control, directly or indirectly, any of the programing on such cable system except as provided in section 606(a)(1).

"(d) Notwithstanding the provisions of subsection (a) of this section, no telecommunications carrier shall engage in the provision of cable services in the same operating area, unless the Commission, in any particular case, shall otherwise permit and then only upon a sufficient showing that such provision by a carrier will provide significant additional media diversity and competition. In any particular case, the Commission shall require conditions which foster the purposes and policy of this Act.

"(e)(1) Notwithstanding the provisions of subsection (d) of this section, telecommunications carriers serving rural areas with low population density, as defined by the Commission, may provide cable services in such areas.

"(2) The Commission shall prescribe regulations necessary to carry out the provisions of this section within the 180-day period following the date of its enactment.

"DEDICATION OF CHANNEL CAPACITY

"SEC. 606. (a) The Commission shall require cable systems having twenty or more television broadcast channels (120 MHz or more of bandwidth) for immediate or potential use to dedicate or set aside—

"(1) 10 per centum of such channels for use by public, educational, and governmental channel programers; and

"(2) 10 per centum of such channels for use by leased channel programers.

"(b)(1) The obligation to provide access imposed under paragraph (2) of subsection (a) of this section (relating to leased channels) shall cease upon determination by the Commission that there are reasonably available alternatives for persons desiring to provide programing service to the public in a particular geographic area or market.

"(2) In determining whether there are reasonably available alternatives in the relevant area or market, the Commission shall consider—

"(A) the number and size of other providers of service;

"(B) the extent to which service is available from other providers;

"(C) the ability of such other providers to make such service readily available at comparable rates, terms, and conditions; and

"(D) other indicators of the extent of the competition.

"(c) The channels referred to in paragraphs (1) and (2) of subsection (a) of this section shall be made available on a first-come, first-served, nondiscriminatory basis.

"(d) Until such time as there is demand for each channel full time for its designated use, public, educational, governmental, and leased channel programing may be combined on one or more channels. To the extent time is available therefor, such dedicated channels may be used for other services.

"RATE REGULATION

"SEC. 607. (a) Each State or political subdivision or agency thereof, or cable franchising authority, is authorized to establish, fix, or otherwise restrict the rates, on a nondiscriminatory basis, charged for the use or sale of cable channel capacity or time on such channels referred to in paragraph (1) of subsection (a) of section 606.

"(b) Each State or political subdivision or agency thereof, or cable franchising authority, is authorized to establish, fix, or otherwise restrict the rates, on a nondiscriminatory basis, charged for basic services.

"(c) No executive agency of the United States, including the Commission, and no State or political subdivision or agency thereof, or cable franchising authority, shall have authority to establish, fix, or otherwise restrict the rates charged channel programers by cable system operators for the use of channels described in paragraph (2) of subsection (a) of section 606.

"CRIMINAL AND CIVIL LIABILITY

"Sec. 608. Nothing in this title shall be deemed to affect the criminal or civil liability of channel programers pursuant to the law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that the cable operator shall not incur such liability for any program carried on any public, educational, governmental, or leased channel referred to in paragraphs (1) and (2) of subsection (a) of section 606, or for any program originated by a channel programer having no ownership affiliation with the cable system operator.

"CARRIAGE OF BROADCAST SIGNALS

"Sec. 609. The Commission may establish the terms and conditions respecting the carriage of radio and television broadcast signals by cable system operators.

"FAIRNESS DOCTRINE, EQUAL TIME, AND REASONABLE ACCESS

"SEC. 610. No executive agency of the United States, including the Commission, and no State or political subdivision or agency thereof, or cable franchising authority, shall require a cable operator to comply with the provisions of sections 312(a)(7) and 315 of this Act.

"FRANCHISE FEES

"SEC. 611. (a) The Commission shall establish reasonable ceilings for the fees to be paid to States, or any political subdivision thereof, by operators of cable systems receiving franchises from such State or political subdivision thereof and, periodically upon its own motion or upon petition, may review the appropriateness of such ceilings and make adjustments therein.

"(b) The Commission shall prescribe procedures necessary to carry out the provisions of this section within the one hundred and eighty-day period following the date of its enactment.

"PROTECTION OF SUBSCRIBER PRIVACY

"SEC. 612. (a) No person shall intercept or receive broadband telecommunications unless specifically authorized to do so by a cable system operator, channel programer, or originator of broadband telecommunications or as may otherwise be specifically authorized by law.

"(b) In order to safeguard the right to privacy and security of broadband telecommunications, such broadband telecommunications shall be deemed to be a 'wire communication' within the meaning of section 2510(1) of title 18 of the United States Code.

"(c) In the event that there may be any difference between the provisions of this section and chapter 119 of title 18 of the United States Code, or any regulations promulgated thereunder, it is the intent of the Congress that such chapter 119 shall be controlling.

"(d) No cable operator, channel programer, or originator of broadband telecommunications shall disclose personally identifiable information with respect to a cable subscriber, or personally identifiable information with respect to the broadband services provided to or received by a particular cable subscriber by way of a cable system, except upon the prior written consent of the subscriber, or pursuant to a lawful court order authorizing such disclosure.

"(e) If a court shall authorize or order disclosure, the cable subscriber shall be notified of such order by the cable operator, or other person to whom such order may be directed, within a reasonable time before the disclosure is made. For the purposes of this paragraph, a reasonable period of time shall not be less than fourteen calendar days.

"(f) Any cable subscriber whose privacy is violated in contravention of this subsection, shall be entitled to recover civil damages as authorized and in the manner set forth in section 2520 of title 18 of the United States Code. This remedy shall be in addition to any other remedy available to such subscriber.

"TECHNICAL STANDARDS

"SEC. 613. The Commission shall ensure that cable system operators conform to technical standards necessary to promote the compatibility and interoperability of cable systems, the compatibility of the receivers and other terminal equipment connected to such systems by cable subscribers, and to prevent harmful interference to radio and television communications. No person shall manufacture, import, sell, offer for sale or lease, ship, or use devices which fail to comply with such regulations promulgated by the Commission.

"RECORDS

"SEC. 614. The Commission shall require the maintenance of such records by cable operators and the submission of such reports to the Commission as may be necessary and relevant to the performance of its duties and responsibilities as provided under this title or under any rule, regulation, or order adopted pursuant thereto.

“EQUAL EMPLOYMENT OPPORTUNITY

“SEC. 615. The Commission shall ensure and promote equal employment opportunity by cable system operators.

“SPORTS

“SEC. 616. (a) No cable system shall retransmit into any area within fifty miles of the home stadium of a club which is a member of a professional sports league the broadcast or any part thereof of any game involving that home club or a member club of that league unless it obtains the consent of that home club or its designee.

“(b) Nothing in this section shall prevent a cable system from retransmitting the programing of any broadcast station into an area which is located wholly within that station's ‘local service area’, as defined in section 111(f) of title 17, United States Code.”.

SIGNAL PIRACY

SEC. 2. Section 705 of the Communications Act of 1934 (as redesignated by section 3 of this Act) is amended (1) by designating the existing text thereof as subsection (a), and (2) by adding at the end thereof the following:

“(b)(1) Any court having jurisdiction of a civil action under this section may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a).

"(2) Any person who violates the provisions of subsection (a) shall be liable to any person aggrieved by such violation, for damages as provided by subsection (c).

"(3) Any civil action under this section may be commenced in any United States district court of competent jurisdiction, without regard to the amount in controversy, or in any other court of competent jurisdiction.

"(c)(1)(A) Damages awarded under subsection (b)(2) shall be computed in accordance with subparagraph (B) or subparagraph (C).

"(B) The party aggrieved is entitled to recover the actual damages suffered by him as a result of the violation, and any profits of the person committing the violation that are attributable to the violation and are not taken in account in computing the actual damages. In establishing such profits, the party aggrieved is required to present proof only of the gross revenue of the person committing the violation, and such person is required to prove his deductible expenses and the elements of profit attributable to factors other than the violation.

"(C) The party aggrieved may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits under subparagraph (B), an award of statutory damages for all violations involved in the action, in a sum of not less than $250, or more than $10,000, as the court considers just.

"(2) In a case where the party aggrieved sustains the burden of proving, and the court finds that the violation of subsection (a) was committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory under paragraph (1), by an amount of not more than $50,000. In a case where the person committing a violation sustains the burden of proving, and the court finds, that such person was not aware and had no reason to believe that his acts constituted a violation of subsection (a), the court in its discretion may reduce the award of damages to a sum of not less than $100.

"(d)(1) Any person who violates subsection (a) willfully shall be fined not more than $1,000 or imprisoned for not more than six months, or both.

"(2) Any person who violates subsection (a) willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $25,000 or imprisoned for not more than one year, or both, for the first such offense, and shall be fined not more than $50,000 or imprisoned for not more than two years, or both, for any subsequent offense.

"(e)(1) No criminal proceeding shall be maintained under the provisions of this section unless it is commenced not later than three years after the cause of action arises.

"(2) No civil action shall be maintained under the provisions of this section unless it is commenced not later than three years after the claim accrues.".

REDESIGNATION

SEC. 3. The existing title VI of the Communications Act of 1934 is redesignated as title VII, and sections 601 through 609 are redesignated as sections 701 through 709, respectively.

Senator GOLDWATER. Our first witness this morning will be Hon. Bernard Wunder, Jr., who is Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, Department of Commerce.

Mr. Wunder, you may proceed as you wish.

STATEMENT OF HON. BERNARD J. WUNDER, JR., ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, DEPARTMENT OF COMMERCE

Mr. WUNDER. Thank you, Mr. Chairman. I have a prepared statement which I would ask your permission to include in the record in its entirety, and I will summarize.

Senator GOLDWATER. That will be done.

Mr. WUNDER. Senator Goldwater, the administration wants to express today its general support for S. 2172. I think the time has long passed for the cable industry, which is becoming a very vital industry in our country, to be exposed to varying types of bootstrap legislation under the aegis of the existing 1934 act. Your bill presents a needed and a reasonable framework from both the regulatory standpoint and the deregulatory standpoint for specifying the extent to which Federal and non-Federal officials may affect cable's development.

Having said that, I would like to express some reservations about a few of the points, a very few of the points that are included in your legislation. I think, No. 1, I would cite the provision that would permit municipal ownership of cable systems. We would oppose that. We think that ownership of cable should be left exclusively in the hands of the private sector as we have done in other areas. We are continuing to look at the question of Government competition in many areas. This would fall within that ambit because, quite frankly, once the Government gets into these services based on some alleged need, it is extremely difficult to get them out. Consequently, we would oppose that provision.

The second thing I would point out is with respect to the access requirements. Especially in the large cities where we have multiple channels of significant magnitude, the franchising authorities generally have the capacity to work out such access arrangements. However, I will say that in the event the subcommittee and the Senate Commerce Committee feel strongly about access legislation, my suggestion would be that it should be applicable to not 20 channels or more, but more on the order of 50 channels or more.

I think the third point that I would mention are the sports provisions. In lieu of a new regulatory structure for dealing with the sports issues, it has been our belief that this is generally a copyright issue, in terms of control over the product. What we would prefer to see, quite frankly, is the elimination of the compulsory license and a move toward the marketplace, as opposed to approaching these matters which are generally copyright in a regulatory fashion.

The final point that I would mention is the reciprocity provisions. After lengthy discussion within the administration on whether or not we would support reciprocity in any area, we have generally concluded at this point that we are going to oppose sectoral reciprocity provisions in favor of looking at and considering more general reciprocity provisions and strengthening the Trade Act provisions.

With that, Mr. Chairman, I would be glad to respond to any questions you might have.

Senator **Goldwater**. Thank you, Mr. Wunder. Your prepared statement will be made a part of the record.

Is it your understanding that the leased channel obligation in the bill could be satisfied by the cable operator through the provision of pay services like HBO? In other words, does "leased" mean pay, even though the usual arrangement is not strictly a lease?

Mr. **Wunder**. That would be my understanding.

Senator **Goldwater**. That would be your understanding?

Mr. **Wunder**. Yes, sir.

Senator **Goldwater**. Should Federal law set access minimums or ceilings or both on access requirements?

Mr. **Wunder**. In terms of ceilings, I think as a general proposition, Senator Goldwater, with both the franchising that is going on and the refranchising that is occurring, and the upgrading of the number of channels, it seems to me that this is an area that can generally be dealt with by local government, the local franchising authority.

I think it is a good idea to have access. My concern about your legislation is that making it applicable to 20-channel systems and more is probably too much. It probably ought to go to something on the order of magnitude of 50 channels.

Senator **Goldwater**. Please tell us whether you share the cable industry's fears about the competitive impact of telephone company participation in cable, and also, what role do you think cable can play in the provision of services not traditionally associated with cable?

Mr. **Wunder**. The answer to the first question, Senator Goldwater, is no, I do not share the cable industry's fears about allowing telephone companies to provide cable service. I think especially in rural areas it would be quite beneficial.

I think the principal issue is really nondiscriminatory access. Once nondiscriminatory access can be assured, I think the concern about the competitive threat of the telephone industry is not great.

I think the other issue that would have to be dealt with in some regulatory fashion is the concern about cross subsidy.

In terms of your second question relative to nontraditional cable services, it seems to me that this is one of cable's bright promises. I think this is an area where the future for cable in many respects is offering alternative services, data services, information services, burglar alarm services, a whole host of services which they can provide, especially on the big channel systems, because they have the channel capacity.

Senator **Goldwater**. Well, this bill does not prohibit A.T. & T. or any other telephone company from getting in it, but they have indicated in their testimony before us that they do not want to get into cable television. However, I think we have to sort of play along and see what might happen.

Mr. **Wunder**. I think the question is of not so much whether they want to get into it, but whether they should be barred, barred at this time and barred in perpetuity. I think that companies such as telephone companies can offer and provide service to the public. I think the real issue is, not who does it, but that service is provided. If there is no real anticompetitive effect, which I do not think that there is, then I would say let us not bar them; let us permit them to provide services.

Senator **Goldwater**. I think that is a good suggestion.

Mr. Wunder, do we need to amend the copyright laws in order to solve the problem of professional sports and this bill's solution of a blackout?

Mr. **Wunder**. Senator Goldwater, that would clearly be my recommended approach. It seems to me that we have over the years sought regulatory solutions for what are essentially copyright issues. I think the real issue here is control over one's work product. In the case of the professional sports teams, their work products are their games. It seems to me that if you were to amend the Copyright Act so that the sports team is in the position to have control over its work product, then that would be the recommended solution, as opposed to still another regulatory approach. Let the marketplace work.

Senator **Goldwater**. Well, I think this is liable to be one of the most controversial parts of this legislation.

Mr. **Wunder**. I agree with you, Senator Goldwater.

Senator **Goldwater**. I think the public has the biggest voice in this, and if the public is going to be charged for cable, I think the public has the right to see pretty much what cable can pick up.

I feel, too, that we probably have to get into the copyright laws before we can get the entire thing settled, because it does not only apply to professional athletics, it applies to all copyrights that bear upon use by radio or cable or television.

Mr. **Wunder**. That is absolutely correct. I think that there are many similarities between the sports issues and those other issues. We would like to see it done in a comprehensive way, and that would be through the abolition of the compulsory license and moving to a marketplace approach.

Senator **Goldwater**. There is a bill in the House now, as you know, on copyright.

Mr. **Wunder**. Yes, sir.

Senator **Goldwater**. But I do not think it touches this question of blackout. This to me is going to be one of the major parts of this whole hearing. I am grateful to you for your observations on it.

If our basic objective in establishing a national cable policy is to foster the growth and the development of cable which shall be responsive to and serve the needs and interests of the public, do you believe it would be appropriate to require municipal authorizations for other providers of communications services in order to parallel the franchising requirements imposed on cable systems?

Mr. **Wunder**. By that question, do you mean broadcasting services?

Senator **Goldwater**. Yes.

Mr. **Wunder**. No, Senator Goldwater, I really do not. It seems to me that the predicate upon which the franchising authority is based is the fact that a cable operator must use the streets and ways that the cities have the capacity to authorize. In the other industries such as broadcasting, that is not really required. It would seem to me that that would be a movement toward more Government regulation, and I think I would oppose that.

Senator GOLDWATER. Yes, I would agree. However, I think we could understand the cable industry, although there has not been any great expression on the subject, asking why they should be subjected to the paperwork of franchising when broadcast stations and regular television stations are not. I do not think this is going to be any major problem, but it is something that we were anticipating in a way, not looking forward to, but anticipating.

Mr. WUNDER. I think at the point in time, Senator Goldwater, when there are truly multiple services and there is significant competition, I would like to see the regulatory framework go away.

At the present time, however, in many areas, although you have video cassettes and you have video discs and you do have over-the-air broadcasting, it seems to me for the basic service, at least for the time being, there probably needs to be some continuing regulatory control. I think we will see the time when that is probably no longer necessary.

Senator GOLDWATER. In that regard, to some extent if the FCC were prohibited from imposing a limitation on franchise fees do you think a city would increase its franchise fee? If so, it would probably be a guess, but how much? And since cable must pay a franchise fee, should other program providers have to pay to the city some other kind of entertainment tax?

Mr. WUNDER. In terms of the franchise fee, I would say that the amount of the increase in the franchise fee would probably be contingent upon the financial condition of the city at the time. I am concerned about a lack of a franchise ceiling, a federally imposed franchise ceiling, because it seems to me that it could do harm to the national development of cable if there were no cap. I think that should remain.

In terms of imposing an entertainment tax, I would not support that. I think that cable is slightly different, as I indicated, because they do have to get something from the city, and in return for that they pay a franchising fee.

Senator GOLDWATER. The key section in this bill probably is the provision dividing regulatory authority between the Federal Government and the States. Please tell us whether you believe the division in S. 2172 is appropriate.

Mr. WUNDER. I think as a general proposition I do, Senator Goldwater. It seems to me that section 603 does require some clarification, especially in terms of what the States' role is and what the State can regulate. My concern here is that the reach of the ability of the State or of local government to regulate may be broader than you intended.

The way I understand section 603, the statement of authority, is that the Commission has specified jurisdiction which is exclusive. Then the State has that authority which is not exclusive under the FCC or is not forbidden in the legislation under the title, this title of the bill. It seems to me that I think that needs to be clarified so that the reach of the regulation is more clear on the part of the State.

Senator **Goldwater**. We want to thank you, Mr. Wunder, for appearing before us this morning, and thank you for your observations. And if at any time as we are trying to develop legislation you feel that you have anything to add, please give us a call.

Mr. **Wunder**. Thank you, Senator Goldwater.

[The statement follows:]

Statement of Hon. Bernard J. Wunder, Jr., Assistant Secretary for Communications and Information, U.S. Department of Commerce

Thank you for this chance to discuss some of Administration's views on cable television regulation and S. 2172, the comprehensive measure that the Subcommittee and its expert staff commendably has proposed.

Our general position on the cable television legislation is quite simple and straightforward: We think that the time has passed for varying, "bootstrap" regulation of this increasingly important industry. Cable television promises to yield further public dividends by expanding the diversity of competing news, information, and entertainment services available to the American people. For the past decade or more, however, this capital intensive business has been needlessly subject to duplicative and wasteful, often hostile, and usually confused Federal, State, and local regulation. The confusion that has surrounded the regulation of the cable television was bad enough when we were dealing with a very small, cottage industry. Today's cable business is neither, however. We share the Subcommittee's conviction that a sound regulatory framework is thus needed, especially to provide a firm foundation for cable's efficient, future development.

While we support the basic thrust of the Subcommittee's initiatives in the cable television field, we have reservations concerning certain aspects of S. 2172. Although we do not disagree with the principle of system access reflected in the bill, for example, we have several recommendations concerning how better to implement such a proposal.

Let me begin my statement by briefly reviewing some relevant facts regarding the cable television business. Then I would like quickly to review some of the failures and successes of past cable television regulation, and to explain further why we believe strongly that new legislation here is definitely needed. Finally, I would like to address some of the particular features of S. 2172, and to point out specific aspects and provisions that we believe should be clarified and improved.

Cable television, to begin with, enjoyed a year of substantial growth and achievement in 1981. The number of cable subscribers rose about 2.4 million to some 20 million, or about 60 percent more than just five years ago. Basic cable revenues were about $2 billion; pay cable revenues, derived from about 11 million subscribers, topped $1 billion. Not only was 1981 thus something of a banner year for the cable television business, but most expect the same to be true in 1982. Our forecasts call for an increase in the number of subscribers of about 2.1 million, and an increase in revenues of about $500 million.

By 1986, we expect the number of cable subscribers to exceed 32 million, or about 40 percent of all television homes. Cable revenues in that year, counting both basic and pay, should be about $7.8 billion, or just a little shy of where the broadcast television business is today. By 1990, moreover, we forecast that more than 47 million American families will subscribe to cable television, and the business will enjoy total revenues of more than $14 billion.[1]

Today's cable television business, of course, bears scant resemblance to the genuine cottage industry that emerged in the late Forties. "Mom and pop" cable developed chiefly in remote rural or mountainous regions, and it functioned as a simple adjunct to the broadcast television industry that was then maturing. As late as 1976, and after over 20 years of growth and expectations for a "wired nation," only about 12 million—or 17 percent—of U.S. television households subscribed.[2]

A good deal of the slow initial growth of the cable television business can be attributed to the presence of regressive Federal Communications Commission (FCC) regulations, explicitly designed to hamstring the industry and to thus stymie any real or imagined adverse impact on "free television." The dreary record of early FCC cable regulation, of course, has been rehashed in considerable degree in several authoritative sources, so I will simply summarize its features here.[3]

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[1] U.S. Department of Commerce, "1982 U.S. Industrial Outlook" at p. 369.

[2] See generally NTIA staff report, "Cable Copyright: Alternatives to the Compulsory License" (1981) at pp. 14 et seq.

First, the FCC, beginning in 1962, imposed on the cable business rules limiting the number of nonlocal or "distant" signals that could be "imported," ostensibly to prevent the potential "fragmentation" of the local audience base available to support various local television station operations and programming. Second, of course, the FCC, beginning in 1972, placed severe limits on the diversity of programs cable systems might offer on a per-program or per-channel, pay basis. Initially, the rationale underlying these pay cable rules was to forestall potential "siphoning" of movies, sports, and other programs away from "free TV"; on appeal, the rationale was changed slightly, however: the pay cable rules were said to be needed to prevent "undue delays" in the airing of feature films on broadcast TV. See *Home Box Office* v *FCC*, 567 F.2d 9, 40 (D.C. Cir. 1977).

Virtually all of the FCC's tangled web of cable television regulations were premised on the slender statutory thread of "reasonable ancillarity." See 47 U.S.C. Sec. 303(g)(1976). Cable television operations could affect broadcasters' audiences, the FCC reasoned, and hence the Commission had an obligation to impose protective regulations. Additionally, and despite Supreme Court decisions to the contrary, the FCC maintained that cable television operations were at odds with the "spirit" of the 1909 Copyright Act, and thus should be pervasively regulated to safeguard the program production industry.

At the same time that the FCC was imposing Federal constraints on the development and operation of the cable business, State, county, and city governments also were imposing various regulatory schemes. If the FCC sought to regulate cable television because it resembled over-the-air television, most State and local governments sought to regulate it because, to them it resembled the telephone business. Franchise agreements requiring cable systems to provide "free" services for sundry purposes, and imposing rate regulation were developed. The "cap" that the FCC placed on local franchise taxes and fees, of course, simply encouraged cable companies to compete for franchises on "free" service basis.[4]

In 1976, President Ford signed new cable television copyright legislation into law and, in so doing, removed whatever legal merit there might have been in the FCC's contention that its cable rules were a necessary surrogate to proper copyright protections. In 1979, the Commission released a detailed study concerning the economic and competitive costs of two of its major cable rules, the distant signal importation and the syndicated exclusivity regulations. Finally, the Commission in 1980 abandoned these rules and, of course, its *Cable Television Deregulation* ruling was subsequently sustained on appeal.

A number of cable regulations still remain in place. These include the network exclusivity, "must carry," and sports carriage regulations, the rules governing broadcast station and national network investment in cable, and the limit on franchise fees and taxes. Additionally, the highly regulatory 1976 cable copyright scheme remains. As you know, the Administration several times has urged Congress to scrap this outmoded copyright arrangement and to move towards a marketplace solution.[5]

With the advent of FCC cable deregulation, however, plus the accelerated wiring of the Nation's major urban centers, we think that it is desireable and appropriate for Congress to turn now toward establishing a firm statutory framework for cable television. Overall, most of what the Federal Government actually does in this as well as other contexts is to send signals to the public and to the investment community. Through our tax code, our criminal laws, and through general industry-releated legislation, for example, we seek to encourage private acts of investment, business development, service to the public, and job creation.

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[3] See, e.g., Subcommittee on Communications Staff Report, "Cable Television: Promise versus Regulatory Performance" (94th Cong., 2d Sess., 1976); Ford Administration Papers on Regulatory Reform: "Cable Television Deregulation" (P.W. MacAvoy, ed., AEI, 1977); "Cable Television Deregulation Order," 79 F.C.C. 2d 663, 48 P. & F. Radio Reg. 2d 171 (1980), aff'd, *Malrite TV* v. *FCC*, 652 F. 2d 1140 (2d Cir. 1981).

[4] See "Cable TV Capacity and Access Requirements," 59 F.C.C. 2d 294, 330–31 (1976) (Robinson, Commissioner, dissenting); *FCC* v. *Midwest Video*, 440 U.S. 689, 709 (1979), aff'g, 571 F. 2d 1025, 1053 (8th Cir. 1978).

[5] See, e.g., testimony of Assistant Secretary Bernard J. Wunder, Jr. before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, concerning cable copyright, June 24, 1981; testimony of Deputy Assistant Secretary Dale N. Hatfield before the Senate Judiciary Committee, May 29, 1981; letter from Assistant Attorney General Robert A. McConnell to House Judiciary Committee Chairman Peter Rodino, concerning H.R. 3560, dated Mar. 22, 1982.

From a broad public policy standpoint, the greatest evil associated with past Federal cable television regulation was the diversity of confused, indeed, often negative signals sent to the public and the investment community concerning this important business. Unquestionably this caused the risk premiums associated with this capital intensive industry to rise needlessly. The development of new industry whose services many in the public clearly value highly was thus unnecessarily handicapped and slowed.

In conjunction with our efforts in the common carrier communications field, the administration has stressed the criticality of certainty and predictability, especially when the operation and development of capital intensive businesses are at stake. The fundamental virue that we see in legislation along the lines of S. 2172, Mr. Chairman, therefore, is that it would provide just the sort of certainty and predictability we believe is strongly needed, if the cable television industry is to mature efficiently.

S. 2172, first, provides a regulatory framework for the cable television business. The bill would accord the FCC limited statutory authority to regulate cable television as an interstate communications medium, something that is appropriate today given the industry's structure and use of interstate facilities, such as communications satellites. The Commission's past role as primary cable regulator would thus be codified. While S. 2172 would provide for primary Federal regulation of the cable television industry, this regulation would be strictly limited. Proposed new section 603(1), for example, provides that the Commission may regulate only as specified in the bill. See *NARUC* v. *FCC,* 533 F. 2d 601 (D.C. Cir. 1976).

Second, S. 2172 would provide for a State and local role in this field. State and local authorities would continue to control cable franchising, as they do now, subject to certain restrictions. See, e.g., *Teleprompter Cable Systems, Inc.* v. *FCC,* 543 F.2d 1379 (D.C. Cir. 1976). They would continue to be able to regulate basic subscriber rates, but not the rates charged for pay and other cable services. See *Brookhaven Cable TV, Inc.* v. *Kelly,* 573 F.2d 765 (2d Cir. 1978). State and local authorities would be limited to regulating the rates cable systems, charged for providing public, educational, or governmental channel access. There would be no regulation of rates charged leased channel programmers or subscribers to such services.

Third, S. 2172 addresses the relationship of the cable television to other mass media and related businesses. Proposed new section 605(d), for example, would continue the present general restriction on telephone company involvement in cable television, as well as the present FCC exemption for low population, rural areas. See, e.g., *GTE of the Southwest* v. *FCC,* 449 F.2d 846 (5th Cir. 1971).

Fourth, S. 2172 contains a number of provisions dealing with the operation of cable television systems. Cable subscriber privacy rights would be established (proposed new section 612). Cable television systems would be exempted from any criminal or civil liabilities potentially arising as a consequence of programming run on a system by unaffiliated channel users. Cable system operators would continue to be subject to equal employment opportunity obligations.

Although we are in fundamental agreement with the Subcommittee concerning the desirability and need for basic organic legislation governing cable television, there are provisions of S. 2172 that are of concern to us. Let me discuss each of these areas of concern separately.

DEDICATED CHANNEL CAPACITY

S. 2172, essentially, would require all cable television systems with twenty channels or more to set aside or dedicate 20 percent of their capacity for (a) public/nonprofit and (b) unaffiliated, commercial channel users (proposed new sec. 606)). At present, about three-quarters of the Nation's 4,000 cable systems have twelve or fewer channels, and this channel dedication requirement would thus not affect the majority of the business. The provision would, however, obviously affect the higher channel capacity cable systems that are now being proposed or constructed in many major urban markets.

Many, if not most, major market cable television systems are already under some form of channel access requirement today, by virtue of their franchise agreements with the relevant locality. Under S. 2172, franchising authorities and cable operators would be free to negotiate arrangements suitable to local interests and needs. Additionally, cable television systems may be subject to general access requirements under the antitrust laws.[6] A cable television system operator who unreasonably re-

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[6] See, e.g. *United States* v. *Terminal Railroad Association,* 224 U.S. 383, 402–03 (1912); *Gamco, Inc.* v. *Providence Fruit and Produce Building,* 194 F. 2d 484, 487 (1st Cir.), cert. denied, 344 U.S.

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fuses unaffiliated pay able programmers access to his system in order to monopolize the provison of such services, of course, could be liable to severe sanctions under the antitrust laws.

The operators of most large capacity cable television systems today have an affirmative incentive to maximize access to their systems, in order to heighten the attractiveness of their service to subscribers. "Tiering," or the addition of multiple pay channel service options is inceasingly widespread. It is true that, in the past, operators have resisted FCC requirements that they provide channel capacity and local origination facilities far in advance of any public. See, e.g. *FCC* v. *Midwest Video Corp.,* 440 U.S. 689 (1979). We have little evidence indicating, however, that access to major market cable television systems is a serious problem. Any potential problems may be within the reach of existing mechanisms, such as the antitrust laws mentioned above.

The channel dedication proposal in S. 2172 could impose potential cost burdens on cable systems—costs that would be borne ultimately by subscribers. If the Subcommittee believes that enactment of such a special access provision at this time is needed, we recommend that it apply only to systems of 50 channels or more.

MUNICIPAL OWNERSHIP

Proposed new section 605(c) would allow States and municipalities to own cable television systems, provided they were acquired for fair market value. In such instances, the governmentally owned cable system would be precluded from programming other than public/nonprofit fare.

We are generally opposed to ownership of cable television systems by government at any level, whether State, local, or Federal. Cable television is a capital intensive business which, while it is growing rapidly, still embodies a high degree of commercial risk, particularly in major metropolitan areas. We believe as a matter of basic principle that it is wrong for government, in essence, to speculate with taxpayers' money. This is especially true here where the private sector has amply demonstrated a willingness promptly and adequately to fulfill any public demand for cable service.

The hazards implicit in government enterprise include the fact that it typically proves nearly impossible for such operations to price their services efficiently. This is true because experience proves it is exceedingly difficult for the managers of any government enterprise to resist providing "free" or discount rates as a consequence of political pressures. When taxes forgone are adequately considered, government ownership from the public's standpoint almost always proves to be a bad bargain.

The United States currently enjoys the highest level and the finest quality of broadcast television service of any developed country. This was achieved primarily through reliance on our competitive, free enterprise system. Cable television, moreover, is not now—nor is it likely soon to be—a truly essential service. Providing for possible municipal ownership, additionally, while at the same time sharply curtailing the programming that the cable operator can provide under such circumstances also makes little sense. These programming restrictions could only increase the risks already inherent in cable television operations, and thus exacerbate the fundamental problem of government, in essence, gambling with local rate and taxpayers' money. In sum, we do not support legislation sanctioning government ownership of cable television systems, and we urge that these provisions in S. 2172 be deleted.

SPORTS

The FCC's 1980 *Cable Deregulation* order left the earlier signal carriage rules regarding sports events basically in place. See 47 CFR Sec. 76.67 (1980). These rules afford local teams "gate protection" against cable exhibition of the team's own games. Under proposed new section 616, however, teams would be protected against the local showing on cable television of "any game involving that home club or a member of (its) league." Currently, for example, a Chicago cable system may not lawfully import from New York the telecast of a Cubs game. The Chicago cable system can, however, make the Cubs game available to its subscribers if a local television station chooses to air it. Under the bill, the Cubs could block the local exhibition on cable not only of their own games, however, but those of any other National League club, Ted Turner's Atlanta Braves, for example. In short, S. 2172 would pro-

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817 (1952); *American Federation of Tobacco Growers* v. *Neal,* 183 F. 2d 869 (4th Cir. 1950). Cf. *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951); *Bell Telephone Co. of Pennsylvania* v. *FCC,* 503 F. 2d 1250 (1974), cert. denied, 422 U.S. 1026 (1974).

tect professional sports clubs from "competing" with their own games and from competing against the local cable showing of another's games as well.

The basic problem here is that professional sports clubs currently do not have control over the distribution of their games via cable television outside their home territories. By longstanding custom, league clubs do not sell the television exhibition rights to their games in other clubs' home territories. A club cannot now prevent a cable system running its games in a distant market, however. The problem, of course, is that if the games of a winning team are available on cable, attendance at the games of a losing local team may suffer. This kind of competition may not always be compatible with the league system in professional sports, which seeks to maintain rivalry between and among roughly equal clubs.[7]

Our recommended solution to this problem, of course, is not the adoption of a highly regulatory system governing the distribution or nondistribution of sports programming on cable. Rather here, as in the case of syndicated programming, we urge Congress to change the compulsory licensing system created by the 1976 Copyright legislation.

If Congress does not adopt our strongly recommended marketplace solution to the problem and, instead, chooses to expand the scope of exclusivity protection accorded professional sports—as S. 2172 proposes—Congress may want to consider providing for the televising of national sports events. If special cable exclusivity rules governing sports are legislated to preserve the integrity of the league system, then it may be appropriate to require that some of the fruits of the league system—namely, national sports events such as the World Series or the Superbowl—be shown to the public on broadcast television.

Our preferred and strongly recommended approach, however, would be to change the present compulsory license system and to allow the sports industry, the cable industry, and the broadcasting industry to negotiate and compete for exhibition rights.

RECIPROCITY PROVISIONS

Proposed section 605(b) would empower the FCC, in essence, to impose sanctions on foreign cable companies competing for American franchises, if their home governments limit American cable firms' operations there. The purpose of this section, of course, is to allow the FCC to place limits on Canadian cable companies' competing for U.S. franchises. With more than 80 percent of the country wired, Canada is the most cabled of major nations; the two largest Canadian cable firms (Rogers and Maclean Hunter) have extensive holdings in this country, and have recently sought additional U.S. franchises.

The Administration has recently recommended against passage of "sectoral reciprocity" legislation such as S. 2172 proposes. We believe that such an approach is fundamentally flawed and, in this particular instance, could needlessly involve an independent regulatory agency in foreign trade and policy questions that are more appropriately the province of the Executive.

CONCLUSION

In conclusion, the Department of Commerce supports the enactment of a sound and lasting statutory framework to guide the future efficient development of the cable television business. We believe that such legislation should be enacted in order to provide clear signals to the public and to the investment community.

While we thus agree with the Subcommittee on the fundamentals of this legislation, we do not support certain of its provisions. Specifically, we oppose sanctioning government ownership and operation of cable television systems, because we believe this is a task best left to the private sector. We believe that the breadth of protection from competition that provisions of this bill would accord the sports industry is unwarranted, based on the best available evidence. And, finally, we recommend against passage of the Canadian cable reciprocity provisions of this bill.

As the Subcommittee continues its hearings on this potentially significant legislation, NTIA stands ready to provide any additional technical assistance needed.

Senator Goldwater. Our next witness will be Hon. Mark Fowler, Chairman of the Federal Communications Commission.

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[7] See, e.g., Horowitz, "Sports Broadcasting in Government and the Sports Business" (R. Noll, ed., Brookings, 1974) at pp. 275–323; *Flood* v. *Kuhn*, 407 U.S. 258, 287 (1972) (Douglas, J., dissenting).

Good morning, Mr. Fowler.

STATEMENT OF HON. MARK FOWLER, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, ACCOMPANIED BY WILLIAM JOHNSON, CHIEF, CABLE TELEVISION BUREAU

Mr. Fowler. Good morning, Senator.

Senator Goldwater. I got your note this morning about QST and my office is trying to get together with yours.

Mr. Fowler. Thank you, Senator.

Senator Goldwater. You may proceed as you wish.

Mr. Fowler. Thank you, Senator. I have a piece of testimony which I am submitting for the record, and I also have a summary which I would like to take up now.

Senator Goldwater. That will be done.

Mr. Fowler. Mr. Chairman and members of the subcommittee: I am pleased to testify on S. 2172, the Cable Telecommunications Act of 1982. With me is William Johnson, Chief of the FCC Cable Television Bureau. I would like to summarize my prepared statement and request, as I have, that you consider the entire statement at the appropriate time.

I am pleased to provide these comments to you on this important effort to establish a definitive national policy with respect to regulation of the cable television industry. I strongly support the enactment of legislation in this area to provide for this dynamic segment of the telecommunications industry in the Communications Act.

For a variety of reasons, establishing a national policy with respect to cable television has proven to be a difficult task. As a result, the Commission has been forced to grapple with the complex set of cable regulatory issues within the general parameters of the 1934 Communications Act.

We have learned two lessons from this experience. The first is that our ability to resolve the mix of unique legal, economic, and technical issues involved in cable television policymaking has been constrained by the need to apply the 1934 act and the regulatory policies developed under it.

The second and most important lesson is that regulatory policy should be directed to authorizing new services, instead of attempting to perpetuate the existing division of markets, channels, revenues or program sources.

S. 2172 raises a number of fundamental and continuing policy questions in the area of cable television regulation. Included among these are the extent to which the first amendment should apply to the various services offered by cable television, the extent to which the market for cable television services is competitive or monopolistic, the appropriate allocation of regulatory responsibility between Federal and non-Federal levels of government; the nature of the competitive relationship between cable television and the telephone companies; and the definition and resolution of communications issues and copyright issues.

This morning I would like to discuss each of these with you briefly. In addition, there are a number of technical drafting issues, ranging from the cable system definition to the expansion of the telephone cross-ownership rules to include all telecommunications carriers, which might need attention. Although I will not discuss these issues this morning, obviously we would be pleased to make our staff available for whatever assistance you might want to have from us.

Section 610 of the bill provides for the repeal of the equal time and fairness doctrine laws as they apply to cable television. As you know, the Commission has found those laws to intrude upon the editorial responsibility of broadcasters and to be, in fact, counterproductive to robust discussion of issues of public importance. Accordingly, I enthusiastically endorse section 610 of the bill.

I would, however, urge you to take an even larger view of first amendment issues. It is a categorical imperative that we restore full first amendment rights to cable television. The absence of any governmental control over program content, whether direct or indirect, should be a fundamental principle of public policy. It cannot be acceptable, as the balance between the print and the electronic media shifts toward the electronic side, that the protections created by our Founding Fathers with the first amendment should dwindle and the balance struck in the Constitution between the Government and the free press should be undone, whether by direct or indirect means.

With regard to the issue of competition and the growth of new technologies, I believe we should start with the presumption that the marketplace environment in which cable television operates is competitive. Consistent with this view, we should be hesitant to impose or to perpetuate restrictions on common ownership of cable television and other communications media. Therefore, I support section 605 of the bill insofar as it precludes such ownership restrictions.

With respect to the issue of cable-telephone cross-ownership, section 605(d) of the bill provides that such cross-ownerships should be prohibited. This is consistent with at least the near-term recommendation of a recent study of this issue by the FCC's Office of Plans and Policy which I would like to submit for the record.[1]

The appropriateness of the cross-ownership restriction proposed in this legislation depends on a number of factual and value judgments. The telephone industry clearly presents special problems whenever it seeks to expand into a service area that is not the subject of rate base regulation. Yet at the same time, the magnitude of possible economies or efficiencies associated with future technical developments that could benefit consumers materially remains largely unknown.

In this respect, any inflexibility in this provision could foreclose real benefits to the public as future technical and economic developments change the present balance of those considerations. I would point out that the Office of Plans and Policies' report, while recommending the retention of the cross-ownership rule at this time, specifically foresees the possibility that this restriction may not always be necessary.

Because of the speed of possible technical developments in this area, I would urge that the legislation insure the agency's flexibility and discretion to determine the appropriate regulatory policy.

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[1] The study has been placed in the committee files.

In the alternative, if the bill retains broad prohibitions against Telco ownership I would urge that "economic efficiency" be added to "competition and diversity" as values justifying the adoption of specific FCC exemptions from such cross-ownership restrictions.

With respect to the issue of the appropriate division of regulatory authority between Federal and non-Federal levels of government, it is essential to recognize that the principal arena of cable regulation is, and I believe should continue to be, at the non-Federal level. This is not to say that certain matters such as pay cable regulation are not of preeminent Federal interest. Outside of specific regulatory areas, however, I strongly prefer a minimal Federal intrusion into the franchising process.

On the specific issue of franchise fee limits, the pendency of a rulemaking on this subject prevents my offering any definitive recommendation at this time. In my formal statement I have attempted to set out economic and legal questions on both sides of the argument which I think warrant your careful consideration.

Section 606 of the bill would require that larger systems reserve a stated percentage of their channels for noncommercial and commercial access use. The reservation of channels for noncommercial use constitutes a subsidy for the benefited users. Such hidden subsidies distort the efficient workings of the marketplace. Thus, the Commission generally has been moving away from regulatory programs that impose such hidden subsidies, either by abolishing them or by making their real costs explicit.

Commercial access, on the other hand, has been recognized as a legitimate means of remedying the bottleneck problems caused by monopolization of the available channels of telecommunications. The critical issue, however, is whether cable television operations engender bottleneck problems at all. I would urge that you address this issue as a matter of prime importance in the course of these hearings.

Section 616 of the bill, relating to the carriage of sports programing, crystallizes the need to differentiate between copyright issues and communications issues in approaching signal carriage questions. I think you touched on this earlier, Senator.

S. 2172 would broaden the FCC's existing rule on sports blackouts. However, viewed solely as a matter of communications policy, there is nothing to suggest that our current rule is deficient in its operation. I recognize of course that sports exclusivity provisions also involve copyright and antitrust considerations. I would be extremely averse to imposing more stringent sports exclusivity rules in the name of communications policy when the predominant purpose of these rules would be copyright or antitrust in nature.

In the absence of full copyright liability, I have no solution to this problem. I do, however, know that the failure to clearly identify copyright issues and communications issues has resulted in some very bad copyright law and some even worse legislative proposals in both the copyright and communications areas.

The emphasis in legislative proceedings to date has been to consider copyright and communications matters separately. The unfortunate result of this experience suggests that joint hearings to consider both the copyright and communications policy implications of provisions such as section 616 may in fact be preferable. I recommend this course of action for your consideration.

Having made these comments with respect to the specific provisions of this legislation, I would like briefly to return to the issues I raised at the beginning of the statement and summarize our general position on each. I do not pretend that my views represent definitive answers to these questions, but I do believe it is important to develop a consensus with respect to the general direction in which we ought to be going.

First, there ought to be general agreement that more attention should be given to first amendment concerns and that direct and indirect restraints on speech and the press should be eliminated.

Second, with regard to the growth of alternative technologies and distribution systems, we should start with the presumption that the media activities of cable systems take place in a competitive environment and avoid the narrow view that cable services lack competition simply because only one system operates in a particular community.

Third, we should recognize some balance in the division of Federal and local regulatory responsibilities. Local government should clearly be the government of first resort when it comes to cable regulation, but we must recognize that cable systems are part of a national telecommunications structure as well.

Nowhere is this better illustrated than in the great progress made in satellite distribution of cable programing. The Commission's open skies satellite policies, virtually total deregulation of satellite Earth receiving stations, and preemption and nonregulation of pay cable have led to the development of new program sources and program diversity that has far exceeded even the most optimistic projections of only a few years ago.

Had we not taken the pragmatic risks associated with each of these decisions, we would not even have a fraction of the service we have today and we would still be expending our energies fending off potential evils and resolving potential problems in attempting to regulate divisions of markets, et cetera.

I find it much more satisfying and publicly beneficial to achieve diversity through prompt facilities authorizations and a policy of nonregulation rather than through content control, ascertainment, program standards, anticommercialization policies, and the other regulatory paraphernalia government has tried in the past with respect to the established broadcast media.

Fourth, where concentrations of market power exist, as they do with respect to established telephone carriers, continued regulation may be necessary, including for example, telephone cable crossownership rules. We should be prepared, however, to eliminate regulatory barriers when it appears that regulation may be costing the public more in terms of technical progress or economic efficiency than it saves, or when changes in the market environment destroy the rationale for such regulation.

The legislation before you sets these issues for debate and decision in a way that should be most helpful in developing the needed policy consensus.

Senator, this concludes my prepared remarks. I would be very happy to respond to questions from you or Senator Cannon.

Senator **Goldwater**. Thank you very much, Mr. Fowler.

Howard, I believe you have an opening statement you would like to make, and then you can ask questions.

OPENING STATEMENT BY SENATOR CANNON

Senator **Cannon**. Yes, thank you very much, Mr. Chairman.

I want to begin by expressing my most sincere compliments to Senator Goldwater for holding these hearings and introducing S. 2172 as their focal point. You put together an impressive array of witnesses that represent all points of view about cable telecommunications. These hearings will be of exceptional value in educating the committee on the basic issues and the policy options before us.

Barry, as I indicated to you earlier last week, Senator Hollings and I have been working to put together a somewhat different package of cable provisions that we would like to offer to the committee for consideration in addition to S. 2172. We have no intention, however, of trying to steal your thunder or complicate these hearings by circulating such proposals while we are all concentrating on this bill.

At the same time, I would very much like to solicit the views of all the witnesses in these hearings as to the alternative approach that Senator Hollings and I will be offering for the committee's consideration. Therefore, we intend to introduce our proposed package later this week so that it can be available to all parties at the conclusion of the hearings.

Then I would respectfully ask that the hearing record be held open for 3 weeks in order to receive written comments on our alternative. I certainly do not think the concepts involved are so novel as to require additional hearings. I am confident that after we hear the witnesses and listen to their suggestions that we will be able to develop legislation that will meet not only today's need for cable communications but to establish a framework for the future uses of this exciting and expanding area of communications.

The progress of cable telecommunications has been most dramatic. What was once a method of retransmitting broadcast signals to isolated areas which traditionally had poor or no reception has grown into an industry that can provide not only home entertainment, news and sports, but transfer funds, provide home security, and accomplish electronic shopping as well. Cable telecommunications has afforded its subscribers the opportunity to take full advantage of the communications revolution now taking place.

I am sure that the witnesses at these hearings will have many meaningful suggestions for the future policy governing cable telecommunications.

Senator **Goldwater**. Thank you. And the record will be held open, as you have requested, for 3 weeks.

Senator **Cannon**. Thank you.

I do have a couple of questions for Mr. Fowler. S. 2172 gives the FCC additional responsibility for cable telecommunications policy. In light of the tight budget that the Commission operates under and the emphasis on unregulation, how will the Commission be able to assume these additional responsibilities?

Mr. **Fowler**. Senator, it is true we would have some additional responsibility, but I do not think it would be so great that we could not handle it. We have an MBO program where we are attempting, and I think with great success, to do more with less resources. It is not as hard as it seems, because frankly, in the past I do not think we did as much as we could with the resources we had. So if we start with that predicate, then we are eliminating programs that no longer make any sense. We are also tying every person in our agency to performance standards. So I think we can do what has to be done that may be required under this bill.

Senator **Cannon**. Without any expansion of funding?

Mr. **Fowler**. That is the way it looks, sir. Of course, if that were to change we would advise the Congress.

Senator **Cannon**. S. 2172 addresses the traditional uses for cable telecommunications. What additions would you suggest be made in S. 2172 or any other cable bill so that all uses of broadband communications be addressed in this legislation?

Mr. **Fowler**. That question takes a good deal of consideration which I have not yet had the opportunity to give it. But I would be happy to provide some written comments to you. That would take some consideration.

Senator **Cannon**. Fine. If you would review that in your own mind and then provide some statements for the record, I think it would be very helpful.

[The following information was subsequently received for the record:]

I would suggest that the following objectives be considered in connection with any legislation that seeks to cover new broadband uses of cable systems.

First, to the extent feasible, the legislation should be "technology transparent" so that regulatory controls are based on the economic circumstances involved rather than the type of technology or firm involved. This will become particularly important in light of the changes in technology that are likely to occur in the years ahead and should also help to eliminate concerns about uneven regulatory treatment of competitors not justified by objective market circumstances.

Second, regulatory involvement should be limited to those situations where defects in market structures exist, appear likely to persist over an extended period of time, and where there is some likelihood that regulatory intervention will be effective in correcting the situation.

Third, an effort should be made to apply any regulation that may be needed only to the communications facilities involved and not to specific services. This is desirable to avoid First Amendment concerns when the broadband facilities are used for the transmission of programming as well as to assure that there is no unnecessary introduction of regulatory distortions into competitive service markets using broadband transmission paths.

At a minimum this suggests to me, as I indicated in my prepared statement, that the Commission authority under Title II not to regulate should be clarified so that fear of regulatory involvement does not delay the introduction of new broadband service offerings.

Senator **Cannon**. Thank you very much, Mr. Chairman.

Senator **Goldwater**. Thank you, Howard.

Senator, did you have any questions or comments? Did you have an opening statement you would like to make?

Senator **Stevens**. I have a question, and that is about the instance of newspapers owning television. You report that 80 newspapers now provide cable news channels on systems serving more than 1 million subscribers. Has that been reviewed at all from the point of view of antitrust law?

Mr. Fowler. We are not aware of any antitrust problems with those facilities which are already in operation, Senator.

Senator Stevens. Are they basically local?

Mr. Fowler. Yes, basically. There are some in which the newspaper might be engaging in a new service in new communities. But essentially, I believe that many of them are local.

Senator Stevens. Is there any indication that any of them have bought channels where they are unable to buy a newspaper outlet in that city?

Mr. Fowler. I could not answer that one way or the other, Senator.

Senator Stevens. Has the Commission ever studied it?

Mr. Fowler. I will ask Bill Johnson to answer that, Senator.

Senator Stevens. Yes, sir, Mr. Johnson.

Mr. Johnson. The Commission has studied the general issue of newspaper cable cross-ownership over the years and it has generally found that there is not a great deal of local cross-ownership. The issue of channel leasing we have not studied from the ownership perspective directly, but making available channels to anybody is something we have tried to encourage in the past and that would certainly include newspapers as well as other media.

Senator Stevens. Thank you, Mr. Chairman.

Senator Goldwater. Well, following up on that, would it not be cheaper for a person in the newspaper business to buy a vacant channel and to use that as the outlet of all their news?

Mr. Fowler. We are certainly looking at those new technologies, Senator. It seems that the newspaper of the future may well be delivered that way. That is why I was particularly glad to see the elimination of the fairness and equal time provisions in this bill, because as the law is now, it seems they would apply to transmission of newspapers through a leased channel. So I think this is a distinct good.

Senator Goldwater. Mr. Fowler, why do you think that cable operates in a competitive marketplace?

Mr. Fowler. The video market is absolutely burgeoning. We have more television, normal conventional over-the-air broadcast signals now than ever before. We may have direct broadcast satellites that could create up to 40 new national networks of video programing. We have MDS, which is a microwave means of transmitting video programing; we will have low-power television, which we have just authorized, that may create up to several thousand new local services; and then of course we have other nonspectrum kinds of video delivery systems such as cable television, video disks and video tape recorders.

I am sure I have left some out here, but I think it is very clear that we are going to be video rich, and I would argue that we already have a workably competitive market.

Senator Goldwater. Mr. Fowler, the FCC currently prohibits certain kinds of cable television cross-ownership such as colocated cable/telephone company, cable/broadcast station and cable/translator; also cable/network, although a limited waiver recently was granted to CBS. There are no restrictions on multiple ownership, foreign ownership or municipal ownership.

Generally, S. 2172 prohibits any regulation of ownership, with certain exceptions for foreign, municipal and telephone company ownership.

Do you support these ownership provisions in S. 2172?

Mr. FOWLER. Senator, let me talk about the telephone cross-ownership rule. As you know, we have such a rule now, although we do provide for telephone companies to operate systems in rural areas because that makes sense from a public interest standpoint. We are looking at this entire area right now. The question we have is, if we authorize ownership of cable television generally by telephone companies now, might this preclude the formation of an alternative competitive local loop system by cable systems? It is not clear what the answer is.

In New York City, the Manhattan Cable Co. is transmitting private line data material using private line systems which are, in the case of that system, competing with the local phone company. But it is not clear how far that is going to go. But if we were to at this point eliminate that rule, we might make it impossible for that kind of competition to form. It is not clear.

I think we need a lot of flexibility, and I think that if you have such a prohibition in the statute, it would be very hard to get it out. So our preference is that we have the flexibility to determine when we ought to eliminate that rule if the circumstances seem appropriate.

The other side of the coin is, as a good colleague of mine from Great Britain has said, it surely seems insane to have two different wires being installed and to dig up a street twice. He said Great Britain regards it as more efficient to have one wire that can provide both telephone service and broadband services. So there are efficiencies there that might redound to the benefit of the consumer because they could arguably provide more services at less cost. So there are balances both ways.

We would like to have the flexibility to be able to watch the situation, and if it seems appropriate in the future to eliminate the restriction, then I would imagine the Commission would do so.

On the foreign ownership question, the provision is certainly consistent with one of our main objectives, which is to protect our vital interests with regard to international telecommunications. I think the real question I have in mind is: Who should administer this tool? I do not quarrel with the thrust of this provision, but it seems to me that this provision is primarily a trade question rather than a communications question. I would rather have someone such as the Special Trade Representative or the Department of State or Commerce who handle the trade matters use this provision, because they can see the broad picture. They can see all kinds of different problems in different sectors of our economy, and it might be that by being able to tie these together, they could exact more leverage rather than having the FCC simply looking at one sector, in this case cable, and attempting to come up with rules that involve reciprocity. I think we might have more leverage and more power if this particular trade tool was given to those who can see the entire landscape and link a lot of things together, not just cable but other matters we might have pending with a given nation. But I think the provision itself is something that this country for too long has not used. We have not looked at it. And we have opened our markets to others and have been locked out of their markets, and that does not seem to make very much sense. I think the people now are indicating they have had enough of that.

Senator **Goldwater**. Well, we have provided a flexibility in this act, and while some countries outside the United States think we are trying to prohibit them from operating, all we are calling for is a little reciprocity. If you want to come to my house, I would like to go to yours, something like that.

Do you see any need for local regulation of pay television or pay services on cable?

Mr. **Fowler**. Senator, I think we have a good track record there. The Commission basically preempted the local municipalities from regulating the rates of pay television. After we preempted them, we said we would not regulate pay cable rates either. I would just look at the record. It seems to me that that regulatory policy decision, in conjunction with the technologies of satellite distribution, have fueled a tremendous growth over the past several years of pay services where both the local and Federal Government got out of the way.

So I think it is a good idea for the time being that we continue to preclude the municipalities from regulating pay television rates.

Senator **Goldwater**. I have one more question.

As I indicated before, I think this will become a very important part of any legislation we write.

Could you please tell us your opinion of the sports blackout provision in this bill? Is this protection necessary?

Mr. **Fowler**. We are very happy, Senator, with the rule we have now, which essentially has a 35-mile radius and blacks out the programs of cable systems within that 35-mile radius. I think that anything beyond that, it is hard for us to see any justification for. I think basically we are getting into the copyright area.

I agree with Under Secretary Wunder that really our ideal scenario is that we have full copyright liability and we get rid of all these rules regarding carriage or noncarriage. That is where we would like to be able to go and let the marketplace work its will with Government not involved.

Senator **Goldwater**. Of course, our approach is a little different from yours. I think as we go along—I do not know if we can do it in this committee, but we have to get some determination as to whether sports have the same protection under the copyright law as, say, the writer of a piece of music has, or a book or an article. It is kind of hard for me to relate baseball to being copyrighted, or football. I think high salaries have a lot to do with this.

Mr. **Fowler**. It is a difficult issue, no question about it, because when you are talking about copyrights, you are talking about the ability to control whether or not people see baseball. That is your concern there.

Senator **Stevens**. Would you yield there?

Senator **Goldwater**. Yes.

Senator **Stevens**. Does not section 616 go further than the existing Commission rule? I am not talking about the difference between the 35 and 50 mile radius. Does this one not prohibit a system from delivering a signal to Seattle as well as within 50 miles of the actual stadium? Is that not the impact of this?

Mr. **Fowler**. It is much broader.

Senator **Stevens**. Because this applies to the whole cable system. The system cannot retransmit it if it has an outlet within 50 miles.

Mr. **Johnson**. My understanding is that it would knock out all games of the same sport from 50 miles of the stadium.

Senator **Stevens**. But further than that, if the system is located in Chicago and it is broadcasting, or retransmitting a game that took place in New York, it still could not send it to Seattle, could it, because it says it cannot retransmit a professional game within a 50-mile radius of the home stadium without club consent? When you are putting it up on the satellite, it could come down in Seattle as easy as coming down in New York.

Mr. **Johnson**. My understanding is that would apply within 50 miles of Seattle if that is where the game was, but it may not be as clear as it ought to be.

Senator **Stevens**. I am saying it is the difference between the system and rebroadcasting on a channel that emits within a 50-mile radius.

Mr. **Johnson**. I am not sure I know the answer to that. I think it is just intended to be 50 miles around the stadium.

Senator **Stevens**. I understand that, but Turner picks up the signal and takes it, it is an Atlanta station and it ends up in Barrow, but he is retransmitting a signal from New York or wherever the game is. He would be barred from doing that, and in effect retransmitting on his system if he had a signal within 50 miles of the game, would he not?

Mr. **Johnson**. I do not believe that is the intent. I would understand it that if there was a team that had its home city in Barrow, that they would be protected 50 miles around that, but that would not stop Turner from sending the game to Chicago or New York or somewhere else.

Senator **Stevens**. Well, I would like you to take another look at it because the way it reads to me, it says that no cable system shall retransmit into any area within 50 miles of the home stadium. The difficulty is that it retransmits it, period, not just into that area within 50 miles of the stadium. So if it puts it up in the satellite, we bring it down, the downlink is in Alaska but another downlink would also be within 50 miles of the system. The system itself cannot shut off that downlink where the station is picking it up. I think there is a technical problem.

So that is what I am saying, Mr. Chairman, and I would like someone to take a look at it.

Senator **Goldwater**. Well, I wish you would study this part 616 and give us your opinion of it, because there is a lot of question on this, particularly as it applies to some of the States that are not as close to the originating point as we would find in Alaska and even my own state of Arizona.

So if you would study that and let us have it for the record?

Mr. **Fowler**. We would be glad to.

Senator **Stevens**. Is the effect of that blackout to black out any signal outside of 50 miles from the stadium? That is what I think it does, and if it does, it should be changed.

[The following information was subsequently received for the record:]

Section 616 can perhaps best by understood in terms of the difference between it and the existing Commission sports blackout rule. The existing rule (47 C.F.R. §76.67) requires cable television systems within 35 miles of the home city of a sports team to blackout the games of that team from distant signals when the home team is playing at home.

Section 616 is applicable only to the events of teams that are members of profesional sports leagues. It could expand the geographic scope of the blackout area from 35 miles around the home city of the team, to 50 miles around the home stadium. More significanatly, however, it would require the blacking out of all events involving member teams of the same sports league, regardless of whether the home team was scheduled to play. It does not appear that any blacking out of events by cable systems more than 50 miles from a team's stadium would be required.

[The statement follows:]

STATEMENT OF HON. MARK S. FOWLER, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman and members of the Subcommittee: I am pleased to provide these comments to you on this important effort to establish a national policy for cable television regulation. I strongly support your efforts to establish legislative guidance in this area and to provide for this dynamic segment of the telecommunications industry in the Communications Act.

For a variety of reasons, national policy with respect to cable television has been difficult to establish. Fundamental policy issues, many apparent from the beginning of the industry, have remained unresolved in the absence of Congressional guidance. I would include among these basic questions the following six:

First, how does the First Amendment apply to cable television, especially in light of the many different types of services that cable can provide? The answer to this question is particularly important in light of the fact that the federal government has tended to carry over the restrictive broadcast regulatory model and local government has slighted the issue in the give and take of the cable franchising process.

Second, to what extent do cable facilities and cable services exist in competitive or monopolistic market environments, and how does the nature of these markets change as new entrants arise?

Third, what is the appropriate division of regulatory responsibility between federal and nonfederal authorities in view of the fact that cable systems are locally franchised and located, yet carry an overwhelmingly interstate package of communications services?

Fourth, what is the nature of the cable franchising process, including the basic issue of whether the process is regulatory or contractual in nature? To what extent does the Supreme Court's recent decision in the *Boulder* case (*Community Communications Company, Inc.* v. *City of Boulder, Colorado et al,* 50 U.S.L.W. 4144 (January 13, 1982)) mean that local policies must give way to national antitrust policies favoring competition? Is cable, as was suggested in an old court case, about as necessary as a "hand-carved ivory back-scratcher" (*Greater Fremont, Inc.* v. *City of Fremont,* 302 F. Supp. 652 (1968)), or is it becoming, as is suggested in a more recent case now on appeal to the Supreme Court, closer to a "practical necessity of modern living?" (*Loretto* v. *Teleprompter Manhattan CATV Corp.,* 53 N.Y. 2d 124 (1981)).

Fifth, what should the competitive relationship between cable systems and telephone carriers be? How does the changing nature of the services offered by these entities affect regulatory policy in this area?

Sixth, how can communications policy considerations and copyright policy considerations be defined, separated, and resolved?

Notwithstanding the lack of consensus on these six issues and despite the changing nature of cable television service, the Commission has made considerable progress in recent years in reducing Federal regulatory controls. This deregulatory effort has increased competition in the delivery of video and other services by decreasing dramatically the snarl of red tape that formerly surrounded their introduction.

There are important lessons to be learned from this experience. Perhaps the principal one is that regulatory policy should be directed to authorizing new services and thereby expanding the supply of new telecommunications goods and services rather than attempting to perpetuate the existing division of markets, channels, revenues, or program sources.

In view of the progress that the Commission has made toward setting its own regulatory house in order, the immediate question that arises is whether legislation is necessary. I would respond in the affirmative, at least with respect to several specific issues. Whether definitive answers to the whole range of regulatory issues posed by S. 2172 are now available is a much more difficult question.

Before turning to the specifics of S. 2172, I would like to highlight a few pertinent facts concerning the cable industry and the services it offers.

First, cable television will be a major provider of television programing for the public in the years ahead. Cable subscribers are now being added at a rate of about 250,000 every month. I have no crystal ball of my own but I have read recent predictions that cable will serve 57 million homes by 1990 with three-fourths of these taking pay service. Other studies indicate that by 1990 cable advertising revenues may total about $3.5 billion.

Second, cable is going to provide subscribers with a greatly expanded menu of television and radio programing. Although the majority of cable systems today may have only twelve channels, there are already almost 50 different satellite programing services available for cable use.

Third, newspapers are getting into the act—providing programing, owning systems, leasing channels, and engaging in joint ventures—challenging those who would regulate to try and distinguish between the constitutional rights of print and electronic publishers. One recent report indicates 80 newspapers are now providing cable news channels on systems serving more than one million subscribers.

Fourth, although cable is just starting to be a significant participant in the provision of nonvideo, nonentertainment services, these services will grow steadily in the years ahead, particularly if not frustrated by unnecessary regulatory impediments. One cable system in New York City is already reported to be receiving close to a million dollars a year in revenues from data transmission services.

Fifth, cable systems, particularly those in major population centers, are going to be facing steadily increasing competition. Current broadcast competition will continue and is expected to intensify. Moreover, new video and nonvideo outlets, including subscription television, low power television, multipoint distribution systems, home video machines, mini-cable systems in apartment buildings, and possibly direct broadcast satellites, are going to be fighting for the same markets cable will be trying to serve.

A great many topics are adressed in this legislation, each of which merits it own detailed consideration. Moreover, there are a number of technical drafting issues, ranging from the cable system definition to the expansion of the telephone crossownership rules to include all telecommunications carriers, which may need attention. I would be pleased to make the Commission's staff available for whatever assistance they might provide in identifying points where clarification would be helpful. At this point in the legislative process, however, I think it may be more useful for me to concentrate on issues of broad general concern.

With regard to the First Amendment issue, a decade ago the Commission applied the broadcast equal time and fairness doctrine requirements to cable systems and the Congress followed up by specifically including "community antenna television" systems within the coverage of Section 315 of the Communications Act. The reasons for doing so are now largely of historical interest; at this point suffice it to say that from my perspective this policy was largely misguided.

As you know, the Commission has found that these intrusions into the editorial responsibility of broadcasters are unnecessary and counterproductive to robust discussion of issues of public importance. Accordingly I enthusiastically endorse the provisions of S. 2172 repealing the equal time and fairness doctrine as now applied to cable television.

I have stated many times during the past year my belief that the traditional arguments in favor of imposing the equal time and fairness doctrine requirements on broadcasters are without merit. They are equally without merit when applied to cable television.

While eliminating the equal time and fairness rules is important, I would draw the point even larger. A primary focus in any cable legislation should be the restoration of full First Amendment rights to cable television. Several years ago in the *Home Box Office* case the District of Columbia Circuit Court of Appeals stated that it found nothing before it "to suggest a constitutional distinction between cable television and newspapers". (*Home Box Office* v. *FCC,* 567 F.2d 9 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 839 (1977).) And, with the advent of electronic transmission of newspapers by cable, the functional differences are merging into one and the same technology.

Cable legislation should provide not only for the elimination of intrusive content control requirements but also the elimination of indirect ways of placing limits on how much and what is said. The absence of any governmental control over the content of programming should be basic. It cannot be acceptable, as the balance between the print and the electronic media shifts toward the electronic side, that the protections created by the First Amendment should dwindle and the balance struck in the Constitution between government and the free press should be undone, whether by direct or indirect means.

Legislative proposals over the past several years would have completely excluded both federal and state regulation of "information services." Although this approach might raise some definitional problems in the cable context, I would recommend the inclusion of a similar provision.

Turning now to the related issues of competition and ownership of cable facilities, I note that four different kinds of restrictions relating to cable ownership are contained in S. 2172: a provision on foreign ownership, a provision relating to municipal ownership, a provision on telecommunications carrier or telephone ownership, and prohibitions on both federal and state rules relating to other types of ownership.

Section 605(b)(1) of the bill would authorize the Commission to adopt rules and policies applied to U.S. ownership of cable facilities in other countries. The concept of reciprocity in international communications is consistent with one of the Commission's stated regulatory goals, which is the promotion of coordination and planning of international communications facilities in a manner that assures the vital interests of the American public in commerce, defense, and foreign policy. What is involved here, however, may be more a matter of international trade than communications policy. For this reason, it might better be dealt with through customary diplomatic and trade regulation channels, including the Special Trade Representative, where there is likely to be a greater sensitivity to the range of international issues involved and perhaps greater leverage as well. If this provision is retained, I would recommend that the legislative history be carefuly drafted to preserve the Commission's discretion to refrain from imposing identical limitations on foreign ownership where our judgment dictates that a more flexible approach in a specific situation would better serve the public interest. For example, the Commission has twice decided not to impose limitations on foreign ownership of U.S. cable systems despite the fact that Canada, whose nationals make up the largest bloc of current foreign owners, does limit U.S. ownership of Canadian systems. Our judgment was premised on the small percentage of foreign ownership, and on the fact that municipal franchise authorities were thought to be in an effective position to review the ownership question in the local franchising proceeding.

Section 605(c) would impose certain restrictions on municipal ownership of cable systems. This provision also has considerable appeal. It is difficult to see why local governments would feel it advisable to assume the highly specialized and technical effort involved in cable system ownership. Nor can I see how they could avoid serious constitutional problems arising from program content control. I would suggest, however, that this issue may not be of sufficient magnitude to impose a federal legislative resolution on an essentially nonfederal issue.

With respect to other types of media ownership restrictions, it is my view that, given the growth in video competition, restrictions in this area should be viewed with an extremely skeptical eye. If there ever was a time when general media cross-ownership rules were needed, it is certainly fast passing. I would caution, however, that the language in Section 607 that attempts to exclude ownership as an issue at the local level may be overly broad. this provision would overrule statutes in a number of states and would further attempt, in a manner that may not be practically enforceable, to remove consideration of ownership from the franchising process.

With respect to the issue of cable/telephone cross-ownership, Section 605(d) of the bill provides that such cross-ownerships should be prohibited. This is consistent with at least the near term recommendation of a recent study of this issue by our Office of Plans and Policy which I would like to submit for the record.

The arguments made in favor of existing policy prohibiting cable/telephone cross-ownership may generally be summarized as follows. First, it promotes competition by developing alternative distribution systems to those provided by telephone companies. Second, it eliminates certain concerns involving regulated carriers gaining substantial influence over the dissemination of informational program material and using such influence in a manner that furthers their own economic interests. Finally, by separatinmg regulated monopoly services from cable services, it eliminates cross-subsidy problems and anticompetitive incentives that may result when regulated and unregulated activities are combined, most particularly where there is significant commingling of the costs of such activities.

On the other side of the issue is the consideration that as technology develops significant economic efficiencies might be realized with a common provider of both services. A continuation of existing policy might forestall technological developments that would permit both broadband and telephone services to be distributed over common plant, producing benefits to the public in terms of reduced costs, expanded channel capacity, and increased access. Developments in the optical fiber field in the U.S. and abroad are sometimes cited as precursors of a future integration of these types of services into a switched broadband communications system.

The appropriateness of the cross-ownership restriction proposed in this legislation depends on a number of factual and value judgments. The telephone industry clearly presents special problems whenever it seeks to expand into a service area that is not the subject of rate-based regulation. Yet, at the same time, the magnitude of possible economies or efficiencies associated with future technical developments that could benefit consumers materially remains largely unknown. In this respect, any inflexibility in this provision could foreclose real benefits to the public as future technical and economic developments change the present balance of consideration. I would point out that the Office of Plans and Policy's Report, while recommending the retention of the Cross-ownership rule at this time, specifically foresees the possibility that these restrictions will not always be necessary. Because of the speed of possible technical develoments in this area, I would urge that the legislation insure the agency's flexibility and discretion to determine the appropriate regulatory policy. Specifically, if the bill retains broad prohibitions, I would urge that economic efficiency be added to competition and diversity as values justifying the adoption of specific agency exemptions from such cross-ownership restrictions.

I also would urge some very careful attention to drifting problems in this area so that the effort to preserve competitive alternatives at the "local loop" level does not inadvertently foreclose cable operators from data distribution or other "carrier" like services.

On the issue of federal-state-local regulatory relationships, I would first note that the principal focus of cable television regulation has always been at the local or state level. The Commission in recent years has returned even more responsibility to local authorities. This is a desirable trend and I see no reason to reverse it. It is sometimes suggested that local abuses and allegations of venality and corruption in the franchising of cable systems should be monitored by federal authorities. I see no need for any added federal oversight beyond that necessary to assure against violations of federal criminal statutes. In fact, the Commission's limited resources would problably preclude us from performing a useful role in this area.

I do not mean to suggest, however, that there are not spheres of overriding national concern. One such area, which I have already mentioned, relates to issues of free speech. Here the nation has already made its fundamental choice. Such restrictions should be, and have been found unaccceptable even when imposed as the result of a popular referendum *Weaver* v. *Jordan*, 64 Cal. 2d 235, 411 P. 2d 289 (1966)).

It is my understanding the Section 607(c) is intended to continue in force the Commission's existing preemption of all local regulations relating to pay cable television operations. I believe this is desirable and would urge that any ambiguity in this language be eliminated. This preemptive policy has been affirmed by the courts (*Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2nd Cir. 1978)), and has contributed to the remarkable expansion of these services in recent years.

The issue of cable television franchise fees is another important aspect of federal-state relations dealt with in this legislation. The Commission has a pending proceeding involving a proposal to eliminate its own rules in this area (*Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in Docket 21002*, 71 FCC 2d 569 (1979)). Thus, I am not in a position to give you a final recommendation with respect to the proposal in S. 2172 to create a reasonable franchise fee ceiling. I do believe the economic and legal questions involved in imposing such a limit warrant very careful consideration. There are clearly arguments on both sides of this question. At this point, I would simply identify some considerations based on our own experience that may be helpful to you.

In the first place, I think it is clear that, without federal restraints, fees at the local level will increase significantly. Fee levels were rising when the Commission adopted its restriction in 1972, and our contracts with local franchising authorities indicate that they are quite interested in the additional revenues they might acquire from cable systems in the form of higher franchise fees.

Of course, high fees are not, in and of themselves, a sufficient reason to impose a federal limit. It can be argued that settling fee limits is an entirely appropriate decision for local officials; that it is desirable for local officials to concentrate on fees in the franchising process rather than on other less substantive inducements to favor one applicant over another; and that higher fees may turn out to be an effective method of dealing with the monopoly profits issue in the cable television field.

On the other side, it can also be argued that high fees place unreasonable burdens on interstate communications; that they distort competitive relationships between cable systems and other communications providers that typically do not bear the burden of such fees (print media, broadcasters, and telephone carriers); that fee bidding is an indirect method of regulating the rates of services which are competitive and ought to be free of rate control; and that such fees, by raising cable prices, restrict output, lower productivity, and result in a welfare loss to existing and potential subscribers.

As a final point I would note that a fundamental question in this area is the extent of the Commission's jurisdiction to impose franchise fee limits. Our authority with respect to the existing rule is now being tested in a court proceeding involving the cable television system in Peoria, Illinois. (*General Electric Cablevision Corporation* v. *FCC*, No. 81-1057 (D. Ill. January 12, 1982. Thus, if there is a Congressional desire to continue rules in this area, the legislation should retain its present explicit grant of authority to the Commission.

Section 606 of the bill would require that channels on larger capacity cable systems be made available for use by outside parties. Specifically, ten percent of the system's channels would have to be available for use by the public and by educational and government channel programmers and ten percent would have to be available for commericial lease. These requirements would apply only upon a finding that the system was operating in a monopoly environment or, more specifically, that "reasonable available alternatives" were not present.

I can understand how, in attempting to compromise the interests of the various parties concerned with cable television regulation, such requirements might enter into the legislative picture. If viewed as maximums, they might well be regarded as a relief from some unnecessary requirements at the local level. However, the reservation of channels for use by public, educational, and governmental authorities at free or reduced rates constitutes a subsidy for the benefitted users. In analogous circumstances the Commission has been moving away from systems of subsidies. Where subsidies have been maintained, we have attempted to make the costs involved as explicit as possible. We have particularly tried to eliminate cross-subsidies in common carrier regulation because they frustrate the operations of competitive markets, muffle the economic signals that ought to be instructing firms where to place their priorities and investments, and can result in undesirable ancillary economic restraints designed to protect the subsidies. Ripples of economic distortion spread through the entire economic system from such subsidies. Thus, I am skeptical as a desirability of federal requirements of this type.

The question of commercial access stands on a somewhat different footing and remains one of the most fundamental regulatory issues in the cable field. From a theoretical antitrust/public utility law perspective, there would appear to be a measure of consensus as to when there is a need for such regulation. It is neither needed nor desirable in competitive markets. However, where markets are not competitive and firms are likely to exercise significant market power over an extended period of time, the theoretical response is a regulatory requirement that makes available "bottleneck" facilities to competitors, at least with respect to vertically integrated firms. (*U.S.* v. *Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912); *Competitive Carrier Rulemaking*, 85 FCC 2d 1, 21-2 (1980).) The whole issue of interstate access to local facilities in the common carrier area is based on this proposition. The proposed access requirement in this bill would thus seem to have some justification, at least in theory. I do not believe, however, that we are yet in a position to suggest the existence of a problem that would call for this solution. I would suggest that one of the important questions to be addressed in these hearings ought to be whether there is any evidence of a present need for this provision.

Even in the absence of specific channel leasing provisions, it would be useful here, or in other Communications Act legislation, to clarify that the Commission has authority to forbear from exercising its Title II common carrier authority with respect to contract carriage by cable systems. Although the principal cases suggesting the existence of such authority are cable television cases (*Philadelphia Television Broadcasting Co.* v. *FCC*, 359 F, 2d 282 (D.C. Cir. 1966); *ACLU* v. *FCC*, 523 F. 2d 344 (9th Cir. 1975)), fear of entanglement with the burdens of common carrier regulation still seems to be a significant factor in discouraging cable operators from making general communications carriage service offerings, particularly in the nonvideo services area.

The matters I have touched on so far are the most critical issues that I see in this legislation. I would propose to touch on a number of other issues only briefly. Section 616 of the bill, relating to the carriage of sports programming, would broaden existing Commission sports blackout rules in terms of the events required to be blacked out as well as the extent of the geographic area covered by the blackout rules. Not included in the provision are amateur and collegiate sports and events which do not involve professional leagues.

I know of no evidence to justify these changes in the rules as a matter of communications policy. However, policy decisions in this area intermingle communications, antitrust, and copyright policy considerations. Present FCC rules provide for a 35-mile, home game blackout of both professional and amateur sports. The rules are designed to prevent sports owners from having to withdraw games from broadcast use in order to protect their fundamental economic base, i.e., their gate receipts. (*Report and Order in Docket 19417,* 54 FCC 2d 265 (1975). Copyright policy, in contrast, has to do with property rights in the events, while antitrust policy is concerned with the maintenance of competition among teams and the avoidance of competition between professional and collegiate football. (Sports Broadcasting Act, Public Law 87-331, 15 U.S.C. §§1291-1295.) I do not have any suggestions as to how these policies should be reconciled in the absence of full copyright liability. I do believe, however, that it would be useful to consider the three areas jointly. The House of Representatives has the issue under review in both the copyright and communications contexts [H.R. 5949]. I would hope that sports policy *per se* is not added to the Commission's agenda. As I have indicated, we have not received evidence that the present FCC rule is not functioning satisfactorily.

With respect to technical standards, Section 613 suggests the need for standards relating to both interconnection and radiation. The Commission has broad authority under existing law to establish controls relating to harmful interference and I do not think the necessity for such authority is questioned. The need for standards in other areas is not as clear. The Commission has exercised its authority to establish general picture quality standards. These were established initially in an effort to provide technical precision to the term "without material degradation in quality" used in the mandatory local signal carriage rules. Their coverage was subsequently expanded and preemption policies were adopted to avoid the incipient development of burdensome and inconsistent state and local standards. Uniform federal performance standards can be beneficial where competition does not fully protect customers or where conflicting local standards are found to be undesirable. In other circumstances, such standards are less desirable than private decision making processes, which are likely to be more flexible and less burdensome. Considerable agency discretion to withdraw from this area is clearly desirable, therefore, to assure that standards setting does not disrupt technical or economic progress.

Interconnection standards, I would note, have not been a significant issue in the cable television area. Industry has its own incentives to make distribution system interconnection possible, and the electronics of interconnection are typically neither difficult nor costly. It may be that some difficult issues will arise in the future with respect to the interface or interconnection between cable television systems and television sets. At present, however, the only issue that has attracted any significant attention involves the redundancy of tuning mechanisms between receivers and cable convertors on high capacity cable systems. The development of component parts or hi-fi type TV receivers may help to solve this problem. This is now a matter of regulatory interest only to the extent the All Channel Receiver Act might be regarded as requiring tuning mechanisms for broadcast reception that are not used for cable reception.

The signal piracy provisions in the proposed new Section 705 of the Communications Act are similar to provisions also found in H.R. 4727. We have supported recent efforts to clarify the law in this area. Because the present scope of Section 605 of the Act is unclear, it is similarly unclear that the provision increasing the penalties for a violation will have the desired effect. Our General Counsel submitted detailed comments and suggestions relating to the signal piracy provisions of H.R. 4727 to the House Committee on Energy and Commerce and I shall submit those comments for the record here.

Subscriber or user privacy issues are addressed in Section 612. Currently, there is no evidence of abuse in this area. However, as cable systems are increasingly used for data transmission, the public's concern with matters of privacy may be heightened. Thus, I see no reason to omit cable from the privacy protections now applicable to common carrier communications. I would caution, however, that careful consideration should be given to the costs imposed compared to the degree of privacy expected and to be guaranteed. The input of industry on this point should be particularly useful. The Code of Privacy released in 1981 by Warner-Annex Cable Communications, for example, may provide some useful focus for this discussion.

The Commission's continued involvement in signal carriage is authorized by Section 609. This would appear merely to codify existing authority. I have no objection to this codification, as long as it remains clear that it in no way suggests that existing regulations must be maintained. The progress this agency has made in reviewing and eliminating unnecessary regulation should be allowed to continue.

Having made these comments with respect to the specific provisions of this legislation, I would like to return to the issues I raised at the beginning of this statement and summarize my general position on each. I do not pretend that my views represent definitive answer to these questions, but I do believe it is important to develop a consensus with respect to the general direction in which we should be going.

First, there ought to be general agreement that more attention should be given to First Amendment concerns and that direct and indirect restraints on speech and the press should be eliminated.

Second, with regard to the growth of alternative technologies and distribution systems, we should start with the presumption that the media acitivites of cable systems take place in a competitive environment and avoid the narrow view that cable services lack competition simply because only one system operates in a particular community.

Third, we should recognize some balance in the division of federal and local regulatory responsibilities. Local government should clearly be the government of first resort when it comes to cable regulation. But we must recognize that cable systems are part of a national telecommunications structure as well. Nowhere is this better illustrated than in the great progress made in the satellite distribution of cable programming. The Commission's "open skies" satellite policies, virtually total deregulation of satellite earth receiving stations, and preemption and nonregulation of pay cable have led to the development of new program sources and program diversity that has far exceeded even the most optimistic projections of only a few years ago. Had we not taken the pragmatic risks associated with each of these decisions we would not have even a fraction of the service we have today and we would still be expending our energies fending off potential evils and resolving possible problems.

I find it much more satisfying and publicly beneficial to achieve diversity through prompt facilities authorization and a policy of nonregulation rather than through content control, ascertainment, program standards, anticommercialization policies and the other regulatory paraphernalia government has tried in the past with respect to the established broadcast media.

Fourth, where concentrations of market power exist, as they do with respect to established telephone carriers, continued regulation may be necessary including, for example, telephone/cable cross-ownership rules. We should be prepared, however, to eliminate regulatory barriers when it appears that regulation may be costing the public more in terms of technical progress or economic efficiency than it saves, or when changes in the market environment destroy the rationale for regulation.

The legislation before you sets these issues for debate and decision in a way that should be most helpful in developing the needed policy consensus. If there are areas where the Commission can provide additional assistance to you we will make every effort to do so. I would expect, in addition, that as our own rule review process continues we will be providing additional indirect input through our substantive decisions.

Senator GOLDWATER. Thank you very much. It is a pleasure to have you before us.

We will now hear from a panel: Mr. Thomas Wheeler, president of the National Cable Television Association; the Honorable Helen Boosalis, mayor of the city of Lincoln, Nebr.; Mr. Stephen Effros, executive director, Community Antenna Television Association; and Ms. Rita Stull, National Association of Telecommunications Officers and Advisors.

I would welcome all of you here and remind you that we have these little colored lights up here only in the interests of trying to keep the show on the road. Your statements will be limited to 5 minutes. As long as the green light is on, you are in great shape.

As long as the yellow light, you are coming into a minute. When the red light comes up, you are supposed to have ended.

So with that, who wants to go first?

I'm going to ask Mr. Tom Wheeler to lead this one off.

STATEMENTS OF THOMAS E. WHEELER, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION; HELEN BOOSALIS, MAYOR, CITY OF LINCOLN, NEBR.; STEPHEN R. EFFROS, EXECUTIVE DIRECTOR, COMMUNITY ANTENNA TELEVISION ASSOCIATION; AND RITA STULL, NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, DIRECTOR, OFFICE OF CABLE COMMUNICATIONS

Mr. **Wheeler**. Thank you, Mr. Chairman. In the interest of time and your limitations here, I have a prepared statement and also some prepared charts and I will try and quickly go through those. I was under the misimpression, apparently, that we had 10 minutes here. So I will move a little quicker than normal.

The purpose of the testimony today is to talk about the goal that you establish in section 602 of your bill, which is stated in the purpose of the act, which is to promote competition. What we thought might be appropriate would be to look at a typical major market in this country and see what competitive realities in the market are. We just heard Chairman Fowler talk about the fact that there are significant amounts of competition in cable. Let us take a look at some of that specifically.

[Charts shown.]

Mr. **Wheeler**. This is the city of Dallas, Tex. In Dallas there are 11 cable operators operating all over the metropolitan area, and in particular there is a brandnew 80-channel, two-way, $100 million system that Warner Amex Cable is building in the heartland of Dallas right here. This market, typical of other major markets, is characterized by intense competition, and let us look at some of those.

Each of these 25 dots here represent a satellite-fed master antenna television service. These people call themselves "private cable" and they are right, because it is exactly the same as a cable television system except for the fact that it does not cross any streets and waves. It is satellite-fed, uses the same programing, sells for essentially the same price, but it has no nexus of local regulation because it does not use any of the streets and waves.

Most of these systems are 12-channel systems, but they can be upgraded to 36 channels. Even though they are only 12-channel systems, they really get double the bang for their buck on those systems because they do not have the must-carry rules, they do not have access requirements, they do not have the kind of governmentally imposed requirements that cable operators have. Therefore, they can provide the services that consumers want at about half the channel capacity that a cable system would have to build.

Again, as I emphasized before, these are not regulated by the cities and there is a recent decision of the second circuit court saying that. These are growing across the country. They are being financed by the major banks, and I guess as the ultimate test of a growing industry, they have even started their own trade association.

To add to this now, if we can flip the chart over, to add to this——

Senator **Stevens**. Do they basically serve just one building?

Mr. **Wheeler**. They serve multiunit apartment complexes and things like this.

You add to this, again existing in Dallas, these three blue circles are three scrambled subscription television stations similar to what we have here in Washington which is called Super TV. Here in Washington they go by the handle "cable without the cable." It is the same kind of premium service, but delivered over the air.

These green areas are MDS, multipoint distribution service. Let us take a look at each of these three STV channels. They have over 100,000 subscribers among them in Dallas. We have a study that we have submitted for the record done by Brown, Horst, and Conaghan, a recognized research group, that says that in a market like Dallas, where you have half—in a market like Dallas, where you have STV coming in before cable, half of the people who subscribe to STV will not change to multichannel cable; they will stick with STV. Again, this is growing nationwide.

The multipoint distribution service represented by the green circles here is a microwave service. It is really the most efficient, the least costly method of getting the service out to consumers. It is the quickest to build and, as I say, the least costly.

So this is what exists today in a major market like Dallas, and this is representative. The consumers who live in this area have multiple choices. We have not even factored in here video cassettes and discs that are selling at about a rate of 8 million units a year; we have not factored in broadcast television, movie theaters, or anything like this.

So we need to take a look at this competition. It is probably the most significant thing that each of these competitors describes themselves in terms of their comparison to cable. They call themselves wireless cable. STV calls itself cable without the cable. MDS is calling itself cable without the wire. The important thing is that they are all going for the same market that we are going after.

If you flip the chart over again very quickly, here are the upcoming technologies. First of all, there are petitions at the FCC to expand these MDS systems to three five-channel systems in each market. On top of that, each of these red circles represent the low power television stations. There would be 18 new low-power television stations in the city of Dallas. Many of these would be for pay, and a scrambled system again that would be competing for cable.

On top of that you add DBS, represented by the dotted lines here. You heard Chairman Fowler talking about 40 new channels coming on line when the FCC makes that approval later this summer, it appears, and there is going to be a significant amount of competition for cable operators.

Mr. Chairman, with your indulgence, if I can just show you one additional point. That is, this is a projection as to how these services are going to grow. This was done by the Yankee Group, a research group in Cambridge, Mass. Look at the significant growth of all these competitive services in here during the 1980's.

We would submit to you that the conclusion you draw from this chart and the other chart is that cable is not a monopoly, that it is highly competitive, and that we ought to be allowed to compete with those systems fairly.

We are submitting for the record a survey, a study for instance done by the accounting firm of Ernst & Whinney that shows that 22 percent of the subscriber costs, $5.60 of the average subscriber's bill, is directly related to costs imposed by city regulation. We have to pay those costs. Our consumers have to pay those costs. But the competitors do not have to pay those costs.

What we are urging is a level playing field where we are going to go out and compete with these people and we do not have to saddle our consumers with the additional costs that they do not have to pay if they go to competitive services.

Thank you very much.

[The statement follows:]

STATEMENT OF THOMAS E. WHEELER, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION

Chairman Goldwater, Members of the Communications Subcommittee, ladies and gentlemen: my name is Thomas E. Wheeler and I am the President of the National Cable Television Association. I appear before you today on behalf of an organization now in its 30th year of operation, representing 1,800 cable television systems which serve 24 million Americans in all 50 states. In addition to my testimony, I understand the Committee will be hearing from many of the leaders of our industry, including the Presidents of both the Arizona and New Mexico Cable Television Associations. On behalf of all of us, I want to thank you for giving us the opportunity to discuss with you our business, our problems and the promise we believe the cable television industry can bring to the American people.

I am grateful to this Committee for scheduling these hearings. We are dealing with issues which are not only vital to cable television, but whose resolution is essential to the development of a national telecommunications network which will continue to be the envy of the world well into the 21st Century. With the great public debate now raging over the federal budget deficits, monetary policy and interest rates, the level of taxation and our urgent national security needs, I could well understand cable television legislation being consigned to the back burner: that you have not done so, Mr. Chairman, is of enormous credit to you and your appreciation for the fundamental public policy questions S. 2172 seeks to address.

Lest there be any misunderstanding, I want to state at the outset that the National Cable Television Association strongly supports the purpose and general direction of S. 2172. The establishment of a national policy towards cable television is long over-due, so we therefore applaud your finding that "the expansion and development of cable . . . is a primary concern to the federal government" and that a uniform federal policy is necessary to "assure the evolution of cable as a medium in its own right." While we have some ideas which we believe will make a good bill even better—and my colleagues will be discussing these over the next three days—I trust you will take these suggestions in the spirit they are being offered: namely, good faith efforts to ensure that the individual pieces of the bill, when taken together, will indeed accomplish the goals you have set for S. 2172.

In my presentation to you today, I would like to take a somewhat different tack. Rather than discussing the ins and outs of S. 2172 itself, I would prefer to take a few steps back and describe the overall context within which this bill is being considered. In short, why is a federal policy for cable television necessary.

To do that, I propose to start with a description of today's telecommunications market-place and cable's position in that market-place; what will it look like five to ten years from now? Having established the economic realities—note I said realities, not perceptions—I would then like to compare the claims the cities are making to justify their regulation of cable against those market-place realities. Finally, I would like to apply this maket-place test against the theory that cable is or will become a bottleneck to the free and open dissemination of information and ideas.

I take this approach not because I believe the Members of this Committee need such an education; were you not experts in communications policy you would not be here this morning considering S. 2171. However, inasmuch as an omnibus cable bill must also pass the full Senate and House, I am not certain that all your colleagues are as aware as you are of the problems the telecommunications industry faces or the pressing need to address those problems in the very near future. If you will indulge me, therefore, I would like to provide for the record the factual background which we believe amply justifies the establishment of a strong, pre-emptive federal cable policy as part of the overall national communications policy.

THE TELECOMMUNICATIONS MARKET-PLACE; ALIVE, WELL AND FLOURISHING

There are two fundamental characteristics of the free market as we know it in this country: the first, of course, is competition. The second, less appreciated aspect is the fact that free markets are dynamic: they change and evolve. Today's perceived winners can rapidly become tomorrow's losers. Less than ten years ago, critics were calling for the break-up of General Motors on the grounds that this giant company already had too high a market share and soon would come to monopolize the domestic automobile market. Unfortunately, someone forgot to mention all this to Toyota, Datsun and Volkswagen. Laughable as the idea of General Motors totally dominating car sales may be today, it was only a few short years ago that to a great many people, this idea was an accepted fact.

I preface my remarks with all of this because, in one sense, cable is perceived today in the much same way General Motors was ten years ago: a huge and growing business which, if not checked, would soon monopolize the electronic entertainment and information industry. We all have a tendency to look at highly competitive, inter-related mechanisms in the simplest way we can: the static view. But as Albert Einstein taught us in his theory of relativity, time and motion in a dynamic environment are far more revealing than a snapshot of an instant in time. While not claiming to be a physicist, I can say with confidence that no free market more accurately reflects this law of science than does telecommunications in general and consumer entertainment in particular.

Ever since the gramophone and commercial radio burst on the scene, the market for home entertainment has been in continual upheaval, with one Buck Rogers product being quickly replaced by another. Gramophones became phonographs, which in turn became hi-fi's, which became stereos; somewhere in this process the audio tape recorder—reel-to-reel—was invented and before long we had 8-track cartridges which soon succumbed to the cassette recorder; even two years ago could one have imagined the cassette recorder reaching the sate of art of the Sony Walkman? This list is endless: from radio sprang television and eventually full color television, while radio split itself into two services: AM and FM, then FM stereo and, soon, AM stereo.

Thirty-four years ago another player entered the market: cable television. For most of its history, cable was a retransmission service which brought off-the-air television signals to areas unable to receive them. It was, in the language of the Federal Communications Commission, truly "ancillary to broadcasting." Back in those days—and that really isn't all that long ago—nobody talked about cable television as a monopoly, a public utility or a danger to America's historic commitment to communications diversity. No, most people were just plain happy to get television reception, period.

It was only when the true potential of a coaxial cable to transmit a wide variety of programing began to be recognized that people—from city mayors to professors of communications—began to speak darkly about the dangers cable posed. I said before I wasn't a scientist, so I won't claim I am using a carbon-14 dating technique, but I guess that the public's perception of cable changed dramatically in the mid-1970's when the first communications satellite used for cable programing was launched. In the years that followed, the programing made available to cable viewers via satellite transmission grew—and is growing—dramatically. Premium movies, all-news channels, 24-hours a day sports, cultural programs, entertainment directed toward minorities: all of this has become standard fare for cable viewers over the past six or seven years.

Now this tremendous growth in cable programing is indeed impressive, and people who have cable enjoy it, but I would be hard pressed to say that what we can now offer the American people is essential to their well-being. Yet oddly enough, it is only in the recent past, when cable was able to provide people with a wider range of entertainment services, that the self-appointed guardians of the public interest have begun to clamor for strict regulation of cable television. When cable was not much more than a community antenna service, bringing television signals into areas not served by regular broadcast stations, no one paid much attention to us.

But if there was any point in cable's history where we might have had some market dominance, it was during that period when we brought off-the-air television into areas unable to receive it, while all the rest of the country was making TV dinners the new American way of life. While I do not suggest that strong government regulation of cable television would have been justified back then, at least the case might have been made that cable was a vital link in connecting the more rural and remote parts of the United States with the mainstream of what was then becoming a much more urbanized society: one might think of us back in the 1950's and '60's as being what the Sears and Roebuck catalogue was to rural America in the early part of this century.

Yet whatever transitional role cable may have had in first bringing television to rural America, the eventual increase in the number of broadcast licenses and erection of television translators has substantially reduced the number of communities where television cannot be received off-the-air. This expansion of television broadcasting combined with the development of satellite-delivered cable programing allowed cable to move out of its original role as being ancillary to broadcasting into its new position as an alternative to off-the-air television.

In its new role, cable has thus far concentrated largely on increasing the variety of video entertainment (I will discuss enhanced—not entertainment—services at a later point in this testimony). Because, by definition, these additional entertainment services are not available on standard television, some have argued that cable is a monopoly which must be controlled. Leaving aside the question of whether the provision of entertainment could ever be considered an essential service, does cable in fact monopolize the provision of the home video entertainment?

If you will recall my earlier discussion of the evolution of the gramophone, the same sort of competition quickly appeared when cable first introduced the idea of premium programming directed at identifiable consumer groups. When others saw the popularity of these new cable offerings, they were not long in offering the same sorts of premium programming themselves, only using different delivery systems. Subscription television, MDS, Satellite-fed Master Antenna Television, low-power television, cassettes and discs, and soon Direct Broadcast Satellites.

Thus began yet another phase in the evolution of home entertainment: from a short-lived period of scarcity to one of surplus.

For business people and entrepreneurs, the further evolution of home entertainment must be viewed in terms of its bottom line impact. However, as the elected representatives of the people, this Committee will be far more sensitive to the public policy ramifications of these changes.

For many years we in the cable business viewed ourselves as the antidote to the technological and economic realities which caused a scarcity of broadcast television channels. Indeed, since we were immune to these limitations, we bagan to view ourselves as synonymous with the concept of program diversity. Only we could offer more channels and therefore only *we* could provide diversity.

The new delivery technologies which have built a business based on the cable model, however, have eliminated any hammerlock cable might have had on diversity. Cable is no longer the only way to eliminate the scarcity of programming options. Whereas cable may have once been, itself, a scarce resource, providing the only alternative to traditional broadcast television, we no longer sit astride that scarcity. If we don't provide a particular service, others will. Even when we do provide a particular service, others are providing it also in a competitive test of just who can build the most consumer loyalty.

This evolution from scarcity of programs and scarcity of channels to a surplus of channels and a surplus of delivery mechanisms has brought with it two major challenges. The first is the challenge of competition: how do cable operators respond to the fact that they no longer are the only alternative to traditional broadcasting? The second is the challenge of formulating public policy which reflects this new competitive reality.

With reference to the challenge of competition, let's review a few facts:

Sometime this summer the FCC will approve the pending Direct Broadcast Satellite applications. That list, which includes two of the three major television networks, will provide somewhere between 30 and 40 channels of video home entertainment. But even without waiting for the launch of the first DBS satellite, parts of this country could begin receiving direct satellite transmissions by mid-1983. Oak Industries has leased four transponders of the Canadian Satellite Anik C to deliver scrambled pay TV programming directly to viewers in the Pacific Northwest and the northeastern United States. A recent poll of consumers showed that 26 percent were willing to spend $300 for a home satellite dish—That's an overnight penetration potential equal to what it took the cable industry 30 years to achieve.

A recent study for NCTA of the competitive impact of subscription television (STV) found that a single-channel STV can sustain a high level of subscribership even after subsequent introduction of multi-channel cable television. In situations where STV has already established itself in a market prior to the construction of cable, fully one-third of those who would otherwise be cable viewers continue to subscribe to STV instead of switching to cable. In other words, the percentage of STV subscribers who change over to cable when it becomes available is only 50 percent. This is significant for two reasons. First, it demonstrates STV's competitive abilities when only offering one premium channel against cable's many channels; in the near future many STV operators will be expanding to two or three channel services. Second, it shows that STV has the capacity to deprive cable of a substantial number of viewers when STV has preceeded cable into the market. Since many urban markets as yet do not have cable, but most have STV, cable operators in these cities will be hard pressed to gain the penetration rates they need to be successful.

The new era of competitive service suppliers has also spawned a new word: SMATV. Satellite-fed Master Antenna Television systems are, in reality, private-cable systems differentiated only by the fact that in reaching the consumer they use private instead of public rights of way. In fact, a SMATV operation in Washington, D.C. calls itself "Washington Cable Systems, Incorporated." The system's operator is seeking approval to distribute premium programming, taken from satellites, to 17 Washington apartment buildings and condominums via CARS microwave from the systems satellite receiving facility in a suburban Virginia condominium. In all, over 6,700 dwelling units would be served by this 19 channel SMATV system, thus cornering the market in premium programming before the District government even grants a cable franchise.

Because they serve multiple dwelling units, SMATV's can cut the heart out of a cable system's market by skimming off high density customers. Consider, for instance, the SMATV proposed for Co-op City, a 15,000 unit complex in the Bronx, New York franchise area. The financial viability of a Bronx cable system which includes Co-op City is far different from the viability of a system without 15,000 high density units. In the Dade County, Florida market, one SMATV operator is seeking to interconnect a numer of multiple unit complexes by 29 channel microwave.

I could go on and talk about Microband's proposal for three five-channel MDS systems in each of the top 50 markets, that's 15 new channels per market; or Hubbard Broadcasting's plan for DBS-fed low power and independent broadcast television stations; or the development of multiple STV channels all operating on the same allocation; or the eight-channel MDS system now operating in Salt Lake City; or the fact that each of these competitive alternatives is significantly less capital intensive than a cable system ($200–250 per subscriber versus $800–1,000 per subscriber). The point must be clear, however, cable television systems are no longer the only method for delivering premium services to consumers.

Of particular concern to the cable industry is that studies we have commissioned show that a large portion of consumer demand for non-broadcast program services can be met by only a four or five channel system such as a SMATV, DBS or multi-channel STV or MDS. Almost 20 percent of existing cable subscribers, for example, said they would switch from a cable to a three-channel STV service if that latter service was priced at "less than double" the price now charged for a single-channel STV. Our study concluded that the key to competition is price: while a five-channel SMATV system, for example, is not a substitute for a 50-channel cable system if both are priced the same, it will *not* take a significant price differential for viewers to favor the SMATV over the cable system.

I cannot overstate the importance of this last fact. Representatives of the cities, when faced with the description of the competitive market-place I have just spoken of, reply that while cable may have competitors, no single competitor can deliver all the things that cable can. However, market research proves that consumers put a very low marginal value on cable's services above and beyond the first four or five channels of premium programing. In other words, while cable can provide more services than any single competitor, the consumers don't particularly care about these "extras."

The new realities of the market-place must also be reflected in the public policy which governs the behavior in the market. My fear is that we are being forced to accept public policy decisions based on what *was* not what is: in other words, cable is being treated based on an out-of-date static view of the market-place rather than being seen as just one player in an active, changing and dynamic market. The result of regulating based on an old assumption is to saddle the cable industry with governmentally-imposed disadvantages when compared to our competitors.

Here, again, the underlying issue appears to be scarcity—or the lack of same. It seems like discussions of cable policy always result in an expanded cable regulation scheme being justified on the grounds that we are a scarce commodity; that we are "the only broadband wire in town." To that I answer, so what! We may be the only broadband wire running down the street, but we must compete like mad to convince consumers to receive their video services from over the wire instead of by microwave, scrambled broadcast signals or discs and cassettes. That kind of competition does not exist in a monopoly situation, ergo, cable is not a monopoly, and attempts to regulate it as such are not based on reality.

Beyond the so-called monopoly perception, however, is the question of whether cable will have equal standing with its competitors in the marketplace or whether government policy will force cable operators to meet the competition with one hand tied behind their backs.

There is no scarcity of outlets for those looking for a means of reaching the consumer. Likewise, the new information and entertainment marketplace offers no lack of alternatives for the consumer to choose among.

Recently, I was in Dallas, Texas, where Warner Amex is building an 80-channel, two-way cable system at a cost of over $100 million. That cable system has to compete today against three STV stations, one MDS operator and innumerable SMATV's. By one estimate, SMATV operators will have the potential to hook-up 200,000 subscribers in the Dallas area alone within the very near future.

From the point of view of the consumer, each of these services is attempting to differentiate itself from the other. As a result, the consumer gets to choose among the programs, the level of service and the price he or she is willing to pay.

From the point of view of those who would like to sell to the consumer, there are numerous pathways to the home. And each of those pathways is competing with the other to attract program suppliers.

Scarcity, either from the consumer's or programmer's point of view does not exist in Dallas. And I submit to you that Dallas is typical of the situation which exists in other American communities today and will be virtually universal in the near future.

Into this hotbed of competition, however, is imposed the chilling effect of governmentally-imposed competitive disadvantges. For instance, the cable system in most places must pay the city the first five percent of each dollar it receives, The operators of the STV, MDS, SMATV and other competitive systems are exempt from such a fee. As another example, the cable operator has to bear the cost of local origination and public access.

REGULATION OF CABLE TELEVISION: THE MARKETS OR THE MAYORS

We have been discussing the highly competitive environment in which cable operates, and we have talked about what we consider some very serious competitive disadvantages which cable alone, of all the providers of home video entertainment, must bear. However, representatives of the nation's cities have an entirely different view of what federal cable policy should seek to accomplish. I think it would be instructive to examine the demands being made by some of these cities in light of the economic realities of the dynamic marketplace we know exists.

Before doing so, however, we should first look at the underlying rationale cities give to justify their actions, whether in the form of franchise fees, rate regulation, access channels, or whatever. Essentially, the cities' arguments are based on the proposition that cable is (1) a monopoly, (2) provides an essential service and (3) is a common carrier.

Alfred Kahn has written that industries which meet these criteria have historically been regulated. On the surface, cable does appear to be similar in some respects to many industries which are regulated. For example, cable is a distribution system like an electric utility which uses a wire like a telephone company. Some believe it provides, if not an essential service, then at least an important one, such as the retransmission of television signals. However, the similarity ends there.

In order to determine whether or not a monopoly exists, it is necessary to define the relevant market. When considering the relevant market for determining the degree of control over the price exercised by a cable operator, it is necessary to look at cross-elasticity of demand, or the responsiveness of the sales of competing services to the price changes of the various cable services.

Since the relevant market for cable systems is the market for all entertainment services, then the market is clearly very competitive, with cable competing with over-the-air television and radio, subscription television, MDS, SMATV, video discs and cassettes, movie theatres, and ultimately DBS.

Note that economic theory has never held that for a market to be competitive each and every product of service must be an exact substitute for another. Pork and chicken are not exact substitutes for beef, but their presence at the meat counter provide a check on beef prices. Likewise, it is not even necessary for reasonable substitutes to exist in a particular market to provide the same competitive effects; the fear of additional competition from potential competitors will often produce the same results. This is especially applicable to cable television since virtually all of its competitors may enter a given market with far less capital investment and considerably fewer regulatory clearances. Even in a market where cable's importation of distant signals provides the only television reception, over pricing of this service could easily invite a new broadcast station, a translator, or, now, one or more low-power stations.

The second requirement for regulation is that the business in question provide an essential service. Obviously, the definition of essential involves a not insubstantial decree of subjectivity. For example, shelter—housing—is considered a necessity of life but it is not regulated in most places nor is another essential. Food. Gas, on the other hand, is regulated even though these are substitutes for residential use of natural gas, one of which, electricity is regulated while a second, heating oil, is not.

It is an interesting twist to suggest that cable's delivery of off-the-air television signals to unserved areas is an essential service. If basic television service is essential. then why doesn't the federal government require the broadcasters themselves to furnish television service to all of the country?

In fact, one would be hard-pressed to make a case for television entertainment being essential in almost every case, and certainly so in the vast majority of the United States where adequate signals are available through use of inexpensive antennas. Moreover, the concept of being essential, as we said, involves a subjective judgment which is likely to differ from individual to individual. It is very hard to make a case that cable television is essential when, on average, one out of every two homes passed by a cable chooses not to subscribe (this is not to suggest, of course, that the 50 percent who do subscribe do so because they consider it essential; most studies indicate that cable is very much a discretionary purchase, which will quickly be dropped if the price goes too high).

The third justification for regulation of cable is that it should be considered a common carrier. This argument must be rejected out of hand for several reasons. First, cable does not choose to be a common carrier or behave like one. It selects that programming it does control (cable must carry local broadcast signals and most franchise agreements require dedication of channel capacity for public access) based on what the operator perceives as the optimum mix to appeal to the most viewers. Contractual arrangement between the operator and the programmer vary widely and in no event involve a fixed price schedule, or tariff. Although a cable operator may offer his services to all people within his service area according to a set rate card, virtually all businesses dealing directly with consumers do the same (the local super-market charges everybody the same price for a quart of milk just as an STV operator offers his service at the same rates).

The cable industry has never been treated as a common carrier anymore than television and radio broadcasters, STV, or SMATV operators have. Moreover, cable has not sought common carrier status or behaved like one. To suggest that common carrier status ought to be imposed on a highly capital intensive industry after most of that capital has been put at risk is a very dangerous, to say nothing of unfair, notion.

To understand why common carrier status would be counterproductive, we need to draw on the conclusions of the preceding paragraphs. First, cable represents a discretionary purchase for the vast majority of people: it is not an essential service and there are a burgeoning number of competitors. Second, to sell its product, cable operators must do their utmost to identify consumer preferences, then provide the programming that best reflects these consumers' demands. This requires that the operator be free to choose among services, dropping those which prove unpopular while adding new services in an attempt to meet the changing demands in the market.

Because of cable's broadband capabilities, meeting market demand does not mean catering to the lowest common denominator so familiar in network television. Even if a system offers 50 channels of programming, viewers will not watch all 50; each household will have its own combination of channels which meets it requirements. However, any sort of common carrier status, based on a first-come, first-served arrangement, will eliminate the cable operator's ability to fine-tune his program offerings to meet the needs of his viewing public. Moreover, once subscribers began to drop cable service, there is nothing the operator could do under common carrier-like schemes to change the programming mix in an effort to reverse these losses. At the same time, it is the cable operator who has invested the capital and is responsible for its repayment.

We can therefore conclude from this that cable does not meet any of the three criteria needed to qualify as a regulated utility or a common carrier. Before leaving this point, however, I would remind you of the one facet of utility regulation which the cities have chosen to ignore. Namely, with any regulated utility, there is a concomitant commitment on behalf of the regulating authority to allow the business to earn a minimum rate of return on its investment. If cities are anxious to regulate cable rates, then are they equally willing to guarantee that cable operators can earn a suitable rate of return on the millions of dollars needed to construct the plant? The answer to this has to be "no" since there is no way to do it. A true monopoly, offering an essential service should have not trouble earning a given rate of return simply because, by definition, they offer a product or service which is very price-inelastic: people cannot drop service as the price goes up, so price increases always translate into more total revenues. Cable, on the other hand, has no such luxury. A system unable to earn its government-approved rate of return could petition for a rate increase, but the more cable rates were allowed to rise, the more customers it would lose, to the point where rate increases actually translated into less total revenues, and therefore an even lower rate of return, than before the increases went into effect.

In light of all of this compelling evidence that cable does not need to be regulated, nor in the interests of the public should it be regulated, cities still press a long agenda of demands against the cable industry. I propose we now examine these demands and see what public interest rationale they have, or do not have, to recommend them:

1. Franchise fees

Local governments want to be able to impose franchise fees on local cable television systems without limitation. The essence of their position is that first, during a time when the Federal Goverment is returning governmental powers and responsibilities to states and local governments, the FCC and/or Congress should not limit what these groups believe is a basic state and local revenue-raising power. Second, they argue that since franchises or cable authorizations are "agreed" to by the local government and the cable operator, excessive franchise fees are a function of irresponsible promises by the cable industry. The local organizations assert that the problem, if it exists, can be dealt with by more responsible cable applicants in the marketplace rather than by legislative mandate.

The cable industry, on the other hand, submits that the solution is through legislative action. The FCC first imposed a ceiling on local franchise fees in 1972 because many local authorities were exacting high franchise fees for general revenue purposes rather than to defray the costs of cable regulation. The FCC was also concerned because such a fee on gross revenues is actually a regressive tax on cable subscribers. Moreover, high franchise fees were found to be a burden on cable television systems which could impede them from carrying out their part in national communications policy. The FCC's franchise fee limitation struck a balance between the achievement of Federal goals and the allowance of adequate revenues to pay the costs of local cable regulation.

Today's increasing shortage of revenues to run local governments further compounds the potential for abuse. As the Senate Commerce Committee observed in its report of S. 898, Report No. 97-170 (1981), at p. 59:

"The Committee is concerned only that without a check on such fees, local governments may be tempted to solve their fiscal problems by what amounts to a discriminatory tax not borne by the competitors of cable service to the long-term detriment of the public."

Moreover, the absence of a franchise fee ceiling permits cities to compel applicants to offer higher fees to stay in contention. This obviously disserves the public. Franchise bidding ought to center on the diversity of programming and other services which a cable system is willing to offer.

Even if the franchise bidding appears "voluntary" in new cable markets, and incumbent operator facing a renewal situation is certainly not a "volunteer." In building the system the operator has made a substantial investment in a community and has finally begun to reap the fruits of his labor. The city is in a position to extract a high franchise fee as the price of renewal. In such a situation the operator has no choice but to pay. Either the cable service will suffer (postponement of capital improvements and/or introduction of new services) or subscriber rates must be increased to cover the cost of the fee increase. Either way, it is the subscriber who ultimately bears the brunt of the city's action.

Cities do obtain money from cable systems in the usual fashion, through income taxes, ad valorem taxes, or personal property taxes, just like any other business. The cable industry does not oppose special fees to compensate cities for reasonable costs of regulating cable television, but the fee should not exceed the out-of-pocket costs of regulation or it quickly puts cable at an unfair disadvantage vis-a-vis its competitors.

It is impossible to understand why the simple use of utility poles or conduit should justify unfettered levies against the traditional cable system. Businesses which compete with cable television do not have to pay special franchise taxes, e.g., television stations, MDS operators, SMATV, and movie theaters. Virtually all private businesses must use public rights of way—the streets—to conduct their business. Our competition such as MDS, SMATV, STV, and television broadcasters all use another form of public rights of way, the air waves, to distribute their product. Unfortunately, from the cities' viewpoint, they cannot tax the air waves.

Perhaps the best example of this discrimination and the weakness of the cities' reliance on cable's use of rights of way to justify unlimited franchise fees is the ever increasing number of SMATV systems. These systems utilize satellite earth stations and microwave to serve, in many cases, thousands of customers with many of the same broadcast and pay programming available on the franchised cable system. Yet, despite comparable services and the use of public and private easements to interconnect multi-unit buildings and single family residences, the local governments have not exacted any franchise fee against SMATV system revenues.

In sum, lifting of the Federal fee ceiling would be discriminatory against cable systems, injurious to their subscribers, and contrary to the maintenance of cable television's role in a national communications policy.

2. Rate regulation

Local governments argue that they must regulate rates for all services provided by a cable system including the basic cable service, pay television and the newer services. First, such regulation of rates is supported as the exercise of a basic governmental power, namely, the municipality's right to impose conditions on the use of the public right of way. Second, it is argued that since cable is a geographic monopoly, rates must be regulated to ensure reasonable rates to all of it citizens and to provide the locality with a mechanism for enforcing compliance with the terms of the franchise.

The cable industry, conversely, argues that rate regulation is not supportable based on its minimal use of the streets, and, under classic economic doctrine, is unnecessary where the service is not a necessity and there is substantial competition for the services provided by the industry.

Since cable television lacks monopoly control over an essential service, there is no rationale for continuing the regulation of any rates for services provided by cable television systems. Cable services possess none of the characteristics of essential utility-type services such as gas, electricity and telephone. While the provision of broadcast signals to the public is clearly not a utility service, regulation of rates for cable delivery of basic retransmission service might be supportable in areas where less than a minimum number of television signals are not receivable off-the-air by the public.

Presently, the only service which local governments can rate regulate is basic cable. However, many franchise agreements force the cable operator to include made-for-cable programming in the basic service in addition to simple retransmission of broadcast signals. The FCC has preempted local governments from regulating rates for pay cable services. The market-place experience in these non-regulated areas should provide convincing evidence that deregulated basic service rates or any other rates will not result in price gouging. Pay cable rates for example, have risen very slowly; indeed, they have risen at a rate well below the level of inflation and well below theater tickets, football tickets and other comparable entertainment fare. A pay cable channel is substantially less expensive than a similar service offered over subscription television or MDS, and yet only pay cable is being exposed to the possibilities of local rate regulation. In offering services in the competitive marketplace cable television must be able to respond in an innovative and flexible fashion to changing market conditions without the burden of regulation. It is the public that will continue to reap the benefit of an unregulated market.

In sum, local government should be precluded from regulating rates for any service provided by cable television except, arguably, for essential basic signal retransmission service in rural areas where a minimum number of over-the-air broadcast signals are not available. Any other approach can only serve to impede the development of cable services to the public. As the Committee's own report (S. 898) cited above concluded at p. 58:

"[Cable] services are nonessential and possess none of the characteristics of utility type services. Furthermore, cable will provide such services in a competitive environment in which it will compete with telephone companies, broadcast stations, subscription television, satellite television services, movie theaters, newspapers, and other electronic services and technologies. The Committee believes that where such competitive market conditions exist, prices will be controlled by consumer action."

3. Government ownership

The representatives of local governments take the position that they should have the right to consider some form of government ownership of cable systems. It is claimed by these spokesmen that this will serve to enhance the competitive delivery of cable services. The cable industry vehemently opposes the concept of government ownership.

Cities seem to be enamored by the profit potential of a large cable system and its uses for augmenting the cities' revenue sources. However, there are significant legal, economic, and political implications attached to government ownership of cable television systems. A local government should not be in the business of providing a discretionary service to part of its population, particularly where a private entrepreneur is more than willing to provide the service. In the same vein, operation of a cable system by a local government is actually a discriminatory method of taxing cable subscribers because it prices the service high enough to create profits for the general revenue fund.

Perhaps the most serious question which arises in the municipal ownership context is the entry of a governmental entity into the provision of an important communications medium. Although there are no express constitutional barriers to government ownership of a cable system, there is a frightening potential for abuse where a local government owns the cable system. A cable system could become a potitical football as one administration defended itself against its challengers who allege mismanagement and/or suppressing of various viewpoints. Cities, more than private entrepreneurs, expose themselves to First Amendment accusations and even law suits when they make programming decisions. One only need recall the successful suit against a state-owned public television station in Texas over its decision not to air the film "Death of a Princess."

Even if operational responsibilities were placed in the hands of quasi-independent boards or commissions, the municipalities will obviously retain control over content, even if indirectly. It is the government ownership of the system which raises the specter of First Amendment abuse.

There are also economic considerations arguing against municipal ownership. The construction and operation of a cable television system is a very expensive and complex undertaking. Most cable systems, particularly in large cities, operate at a loss during construction and for extended periods afterwards. It should be recalled that the two Manhattan cable systems have operated for more than 10 years without showing a profit. Municipalities are going to have to raise money to pay off the debts incurred in constructing the cable system and to subsidize the period of unprofitable operation. Therefore, a government-owned system is being underwritten out of tax revenues which are paid by all of the citizens of the community, including that portion who choose not to subscribe to the cable system or to all of its services. Since one of the major reasons that cities wish to undertake cable operation is to raise revenues, there would naturally be a reluctance by the cities to maintain state of the art technology and rebuild and update cable systems as they age. This too costs money, and money used for these activities will be diverted from general revenue funds which could be better used to fund truly essential activities. Privately owned cable systems, on the other hand, are held to their franchise contract terms and will be forced to update and to rebuild, particularly if they are interested in obtaining a renewal of their franchise.

The impact government ownership will have on local taxpayers is only part of the problem. Since virtually all cities already engaged in cable ownership or thinking about doing so, rely on bond financing which is exempt from federal income taxes, all tax-paying Americans are helping subsidize these cable systems. While the use of tax-exempt financing for non-essential services, especially those which private companies are ready and willing to provide, is a dubious practice at any time, it cannot be tolerated in an age when widening budget deficits threaten to choke off a full scale economic recovery. Simply put, the United States Treasury can no longer afford the revenue loss associated with the indiscriminate use of tax free bond financing.

Cities argue that they will have more community oriented programming if they do it themselves. Of course, it is the government that will dictate what is "community oriented" programming. This goal too can be better realized by private ownership under a properly negotiated cable television franchise. As mentioned above, many cable systems voluntarily offer public access, government and educational channels and agree to extensive local programming, financial aid for studios and program production, and other significant contributions toward establishing localism for the citizens of the community.

Cable television is a new and growing communications medium, and as such, it should not be in the hands of any government entity, no matter how much insulation the government entity believes it has built into its own local situation. Neither newspapers, broadcast stations, or cable systems should be in the hands of government. The shortsighted idea of money-making prospects is not an acceptable rationale for going against the fundamental proposition of the separation of the press and government.

4. Public/educational/Government/access

Local governments want exclusive authority to mandate the provision of cable channel capacity for public, educational and governmental (P/E/G) use. As a general rule, they expect this channel capacity to be given over to them without cost, and will often require the operator to maintain a studio and equipment for use by community groups either free of charge or at heavily subsidized (by the cable operator) rates.

The cable industry is extremely proud of its record in meeting the needs and desires of local governments, citizens groups and educational institutions. It is interesting to note that in 1972, the FCC mandated the taking of channels from cable operators for P/E/G access. This attempt to foster local programming was a complete failure; the channels taken over for access remained (and remain today) largely blank in most areas, with only occassional use by local P/E/G interests. These regulations were subsequently struck down by the Supreme Court in 1979. However, to the cable operator's credit, there has actually been a pronounced increase in the number of P/E/G channels since 1979.

From a public policy standpoint, there are several aspects of P/E/G access which need to be addressed. On the positive side of the ledger, the cable industry believes that channels used for public purposes can be beneficial both to the community and to the cable operator; good public interest type programming can be an added benefit in attracting some customers. Remember, it was the cable industry which founded C-SPAN and carries its programming. We also believe that these public access channels should not be limited merely to local use, but that communities should allow elected officials from both the state and federal level to utilize this capacity as well.

However, problems have developed which this Committee should address in the process of shaping a national policy for cable television. Contrary to the claims of the cities, the problem is not an inability to demand and receive P/E/G channels, but rather their ability to demand and receive an excessive number. In system after system—including the cable system right across the Potomac in Arlington, Virginia—P/E/G channels sit blank 24 hours a day because of a lack of interest in programming them by the cities, while the operators may not reclaim these unused channels for programming which is available and would be enjoyed by the cable viewers. Therefore, an appropriate national policy in this area should not be directed at setting only a floor on the number of P/E/G channels a city can demand, but at the very minimum should set a ceiling as well. Moreover, the concept of allowing cable operators to program unused P/E/G channels makes good commonsense.

A second problem is that cities have come to expect public access channels as an absolute right which they should be given free of charge. They of course get the channels free of charge because the cable operators see this as a cost of doing business: a city demands free channels, and any operator interested in building a system realizes that he has no choice but to give into those demands. Cities, in turn, justify this practice as just another cost of using the public rights of way. However, the rights of way in question—city streets for the most part—are far more valuable for their principle use, that of transportation. Yet do cities demand that dairies provide free milk for the schools in return for being able to use the steets for their trucks? Does a city demand free copies of the local newspaper for all city employes merely because the newspapers use the streets as part of their distribution network? Cities do not even presume to demand free service from a true monopoly, the telephone company, and yet this utility also uses the public rights of way.

Frankly, it is regrettable that it is even necessary to raise the issue of renumeration for public access channels. The cable industry would be willing to donate reasonable channel capacity to cities; we see that as a good will gesture and believe that as good citizens, we have a responsibility to contribute to the well being of the community in which we operate. However, when cities begin to think of P/E/G channels as their birthright, the cable industry has every right to dig in its heels. The capital and operating costs of providing a channel are extremely high, whether that channel is used for a money-generating activity such as premium movies or sits blank on the public access tier. Needless to say, it is the cable viewer who is paying for all the channels on the system; public access channels may be free to the city but they are far from free to the cable subscriber. The cable industry is more than willing to be extremely cooperative in providing cities with channel capacity which is consistent with their reasonable needs, but it is quite clear that many cities no longer believe in the rule of reason.

It has gotten so absurd that in some cities, demands are being made for channel capacity which will be totally under the control of a local body; in this way, costly channels furnished free charge by the cable operator could be used for pay services in direct competition with the cable company. There is no question but that this is an abuse of power which must be addressed as part of an overall national policy.

5. General concerns

There are several overriding practical policy considerations which transcend the specific issues discussed above. The recent *TCI* v. *Boulder* case in the Supreme Court held that cities which were not operating under specific state directives do not enjoy anti-trust immunity for their actions. The regulatory issues discussed above carry great potential for such suits. Although it can be argued that the threat of legal action will serve as a deterrent to overzealous regulation, costly and protracted litigation is not a proper response to the problem. The point here is that cities which are vulnerable to anti-trust suits because of the *Boulder* case should avoid those regulatory steps which will expose them to the possibility of costly litigation. The solution is to limit cities; rights to regulate in certain areas and perhaps to insulate them from anti-trust liability in areas where regulation is legitimate.

The cities defeat their own argument about the need for local regulatory power when they regulate so heavily that competition in the market-place is actually stifled. Fairfax County, Virginia is a current prime example of that phenomenon. After considerable delay, an onerous request for proposals was issued. When the bid date finally arrived, of the dozen or so reputable companies which had been vying for position in the County, only two companies submitted bids. The other companies publicly stated that the County's RFP had been unnecessarily detailed and severe in its requests. Unfortunately, the public was deprived of the bids of many experienced, well-capitalized companies.

Situations of overbearing local regulation are not unique. The current New York City franchising process is another case in point. After a long and arduous franchising procedure, the city finally chose what it refers to as "targeted" applicants, which is to say, tentative winners in the various boroughs. Now the city's demands have been publicized and provide a perfect example of overzealous and unreasonable local regulation. For example, the city wants the franchise to provide that it may purchase all or part of the cable system at any time for "book value." In other words, once the cable system has made its investment in plant, assumed all of the risks, and gotten the business going, the city can decide that it wants to be the cable operator and can purchase the system at plant cost. Next, the city is demanding that the franchise recipients obtain a waiver from the FCC's franchise fee limitation and allow fees in the neighborhood of 10–12 percent of gross revenue. Such a franchise fee would take a whopping percentage of a system's pre-tax profits and further prolongs the time when the system might be able to operate profitably. Furthermore, New York is also asking for the number of required access channels to be as high as 23, including 11 channels for the exclusive use of the city. And the city could even use those channels on a commercial basis thus competing with the cable television system. Finally, the reports required of the cable systems to the various agencies in the cities are unbelievably numerous and complex. A cable system would have to keep a stable of lawyers, accountants, and engineers employed full-time just to comply with all the rules, regulations and reports being requested by the City of New York. Indeed, the City's independent cable consultant to date has reportedly earned over a million dollars for its involvement in drafting the franchises and negotiating the bids. City personnel have been involved as well. The franchise proposal requires these costs to be passed through to the successful applicant. Ultimately, the cable systems must pass the million dollar plus fee through to customers. This entire franchise process in New York City is the best testimony for the cable industry's position that lines musts be drawn to keep the cities from destroying the judgements of the market-place.

The object lesson in all of this is that the cable franchising process has become overwhelmingly one-sided. Cities insist that they only wish to retain the ability to "negotiate" with cable operators. Why, they say, should the federal government keep a cable company from "volunteering" one inducement after another? The answer, however, is equally obvious: negotiations are not fair if they take place between two completely unequal parties. Without franchises to operate their businesses, cable operators have no business. Cities do not need cable television, but cable operators are forced into the position of needing the cities' blessing to use small fractions of the public rights of way.

The cities speak frequently about monopolies whenever the subject of cable is raised. There is indeed a monopoly involved, and that is the city. They have monopoly control over the rights of way, and like the unchecked monopolies of the Gilded Era, they exercise that monopoly power to receive monopoly prices. What is particularly frightening about this is that it is not a vendetta directed only at cable television. We are the convenient target, yes, but have absolutely no doubt that could cities apply the same regulatory overkill to other businesses, they most assuredly would. Nothing could be more of an anathema to this Committee—which has been at the forefront of efforts to deregulate the communications industry—to see local governments impose regulatory restraints on private businesses far more severe than the federal government ever contemplated even in its headiest days of regulatory fever.

It is not only the cities which are interfering with the marketplace development of cable television. In the name of the "new federalism" many states are proposing comprehensive regulation of the cable industry. For example, AB 2742, now pending in the California legislature, would classify cable systems as public utilities and, inter alia, take programming and channel allocation decisions out of the operator's hands.

This over-regulation at the state and local level must be contrasted with the circumstances applicable to other competing technologies. MDS provides an excellent example of this kind of disparity. In the recent *New York State Commission on Cable Television* v. *FCC* case in the U.S. Court of Appeals for the Second Circuit, the Court upheld the FCC's ruling that the State of New York could not require an SMATV system to undergo that local franchising process just because it was receiving a pay program service from an MDS supplier. The FCC's rationale was that such local regulation would interfere with the FCC's national communications policies. This policy of preemption is consistently applied to video services such as MDS, over-the-air broadcasting, STV, the new low-power television service and the proposed direct broadcast satellite services. Thus in these services the FCC permits no local franchising, no local say in programming or facility decisions, no rate regulation, no special fees, and none of the other burdens borne by cable television. All of these local regulatory steps are precluded because these services are considered part of a comprehensive federal communications scheme. Cable television is clearly part of such a scheme as well but it is not freed from this kind of regulation.

This stark dichotomy was noted in a recent filing by Microband Corporation of America, the nation's largest MDS operator. Which proposes to have the FCC permit the creation of an urban over-the-air "wireless cable" network, capable of providing pay television and other broadband communications services. This would be done by increasing the number of MDS frequencies for video and other services allowable in the major markets. Microband argues that a wireless cable network is required immediately because cable operators may not be able to build many markets for several reasons including the fact that cable television is subject to increasingly demanding local regulatory jurisdiction. Overbearing local regulation obviously unnecessarily disadvantages cable in its competition with SMATV, MDS, STV and other delivery systems.

A cursory examination of this disparity in regulatory treatment reveals how illogical it is. All of the federally preempted services referred to above are classified as interstate radio communiations. The FCC selects the licensee, sets technical standards, and promulgates whatever operating rules are applicable. None of these matters can be touched by non-federal regulators. There are purely local incidents of the business, however, which are controlled at a local level such as zoning, building permits and health and safety rules. The distinction is drawn between the actual substance of the activity, which is regulated only by the FCC, and the identifiable local business control issues. Cable television is equally and undeniably a part of the interstate communications scheme. Indeed, it offers the identical services, among others, as those offered by the federally preempted services. Yet, for no sufficient reason, local governments want to regulate many substantive aspects of cable television. Rights of way use, which is often cited as a rationale for this situation, should only justify inspection, safety, environmental and other similar controls. Mandated access channels and rates charged, to name two subjects which cities want to regulate, have nothing to do with rights of way. In sum, there is no functional difference between microwave-linked SMATV systems, for example, and a traditional cable system. And there should be no regulatory difference.

Cable's competitors are now openly declaring their ability to avoid the significant costs and burdens on state and local regulation. More importantly, they provide impartial evidence that this regulation is stalling the expedited entry of cable into many communities. Unfortunatly, their claims of disparity are all too accurate. If Congress and the FCC seriously believe that cable television is indeed an integral part of the national telecommunications network, this discrimination must be remedied. Again, quoting from the Senate Commerce Committee Report at p. 58:

"[A]dvances in the delivery of video services in general have led to a more competitive environment for cable systems. With the development of multipoint distribution services, over-the-air subscription television stations, video discs and cassettes, low power television stations, and direct satellite to home broadcast systems, the role of cable in our national communications system has changed * * *

"In our effort to encourage fair competition, to insure maximum service offerings, and to achieve parity of treatment among the providers of comparable telecommunications service, the Committee believes that the market-place forces, rather then Government regulation, should prevail."

COMMERCIAL ACCESS: A SOLUTION IN SEARCH OF A PROBLEM

Although mandated commercial access requirements are beginning to appear in some city franchising demands, it deserves to be considered outside of that group of issues we might call city-related. While the concept is similar to public/educational/government access in that it would involve removing channel capacity from the cable operator's control, it is fundamentally different in other respects since it concerns for-profit private business.

Proponents of a mandated access policy argue that by allowing a cable operator to select what products and services his cable carries, that operator may discriminate against many businesses who wish to reach cable subscribers by refusing those companies access to the cable system. A better solution, these critics suggest, is to mandate that a certain percentage of a system's channel capacity be set aside for commercial use by companies on a first-come, first-served basis; the cable operator would therefore have no control over what these companies offered. Because this mandated access is for commercial purposes, cable operators would receive payment, either through a common carrier tariff or by some other means, so long as the pricing mechanism did not allow the cable operator to discriminate within the same class of service (that is, the operator could not quote different prices to two businesses offering the same service). There are those who would go so far as to declare cable a common carier and take all the system's capacity outside the discretion of the owners of the system.

Before discussing the inherent problems with this sort of approach, keep in mind that the commercial access debate is becoming focused on enhanced cable services (home security systems, electronic newspapers, access to data banks, home shopping, etc.) more than on what we might categorize as home entertainment. As we discovered earlier, there are an abundance of alternatives to cable—SMATV, MDS, STV, low-power television, DBS and so on—for the delivery of for-profit entertainment programming. Since cable is predominately an entertainment service today, one could fairly say that the battle about access is being waged over tomorrow's new cable services.

Having said this, one can also conclude that if most of these services don't today exist in any quantity, we are then discussing a proposed solution to a problem which does not yet exist. In fact, proponents of mandatory commercial access generally agree that their solutions are preceeding the problem. The difference between these people and the cable industry then revolves around a disagreement over whether there is ever likely to be a problem.

To be your own judge of the odds that a problem might develop, it may first be helpful to put some rhetoric used by proponents of commercial access in perspective.

For example, is it really true that a cable operator controls all his channel capacity? The answer is a resounding "no." Consider the facts.

The FCC has the first claim on a cable system's capacity because of the must-carry rules which force operators to carry all of the broadcast television signals originating in the general area regardless of the fact that cable viewers can receive these exact same channels with a normal antenna. This is a form of mandated commercial access for which the cable operator may charge the use absolutely nothing.

Technical requirements, such as the potential for interference with aircraft communication frequencies, often prevent operators from using some of their capacity.

Local governments demand and receive channel capacity for public, educational and government purposes. Some cities seek to exert programming control through franchise demands, either requiring that specific programming be carried or prohibiting the operator from offering other types (e.g., "adult" movies).

The federal government restricts cable's importation of many sporting events, both collegate and professional.

The consequence of all these layers of regulation is that the cable operator can program only those channels which remain after complying with these dictates. There are, for example, a number of cable systems with a twelve-channel capacity which are burdened with 17 or 18 must-carry signals. There is little incentive to upgrade such systems when the first-come on any new channels created would go to those must-carry signals which can't now be accommodated on the 12 channels available.

A second exaggerated and easily misinterpreted claim put forth by proponents is that cable operators can discriminate against businesses by refusing them access to the cable. In part, this claim is true, but it is better stated that for that channel capacity the operator does control, he may choose between different suppliers of services; but then, so can almost any other private business! Moreover, there are some very good reasons why a cable operator should and must be able to choose.

Do not forget that a cable system has a very finite capacity which is made even more finite by the imposition of such things as must-carry rules. Therefore, not everyone who theoretically might want to offer services over a cable can fit in the band-width available. The same sort of physical limitations apply to a number of radio and television broadcasters which can serve an area. In short, cable may be able to provide a large number of channels, but "large" is not the same as "limitless."

Some may argue in response to this that because a physical limit does exist, that limit should be reached by a first-come, first-served or some sort of lottery technique. On the surface that may appear to be more fair than allowing just the cable operator to decide; but is it really?

The cable operator is not the one who really makes the programming decisions on a cable system, it is the consumer. We have discussed at length why cable does not offer an essential service, and nothing proves that more dramatically than cable's average penetration rate of only about 50 percent of the homes passed. Since the capital cost of passing a home and not serving it is virtually identical to passing and serving a home, cable operators have every incentive not only to keep the customers they now have but to attract as many more as possible. To do this, operators must offer the right mix of programming at the right price. As a result, cable operators must be free to adjust their programming mix to meet the desires of the marketplace whch are expressed by the consumers. After all, it is the operator who has the millions of dollars worth of capital at risk in the cable system, not the third-party commercial interests who only wish access to the customers the operator has been able (at great expense) to attract.

The consumer is not well served by a first-come, first-served policy. The services and programming which might result based on who is first in line or the luck of the draw is highly unlikely to produce the optimum product mix from the consumer's viewpoint. Although a cable operator may guess wrong on many occasions, at least he can re-adjust the product mix in response to consumer demands; the operator has no such option under a mandatory commercial access requirement. Consider the outcome of such an arrangment: perhaps five home security systems get on the cable but no newspaper or no bank-at-home service. Even for services which are in demand, how does the consumer get the best and most innovative of the competing products?

The refrain is a familiar one: cable operators will tend to favor their own programming services over those of a competitor.

In the first instance, the consumer will not allow this to happen unless the cable operator's own product is comparable in price and quality to that of the competition. Secondly, there is a great deal of confusion, apparently, about what business cable operators are really in: the vast majority have no "product" of their own; all of the services they offer are furnished by third parties. For the handful of cable companies which do have programming interests as well, these products would fill up only three video channels at most for any single company. In this regard, it should be remembered that the reason many of these firms got into the programming business in the first place was to provide a product to their cable systems which, only a few short years ago, could not fill their channel capacity from outside sources alone.

Two very fundamental points have just been raised here. First, the vast majority of the programming and services cable operators—whether vertically integrated or not– use on the channels they do control are provided by commercial interests not owned in whole or in part by the cable company. In a very real and concrete sense, then, cable already has an extensive commercial access policy; the only difference is that this policy is shaped and dictated by the marketplace and not by the random spinning of a roulette wheel.

The second point is that vertically integrated cable companies do not provide a wide enough range of products to present a realistic threat that their cable systems will exclude most other competitive suppliers, nor is any attempt to do so with the limited product they do provide exempt from the ultimate decision of the consumer in the marketplace. It is note worthy that the FCC recently examined the issue of vertical integration in the cable industry, and concluded that costs—in terms of price, quality and selection—of imposing a separations policy would exceed any benefits which might occur.

The ultimate argument made by those demanding a mandatory commercial access policy is that some companies will go out of business (or to be able to go into business in the first place) if denied access to a cable system. Cable operators, so they argue, should not be allowed to make such critical life or death decisions. On one level, this is of course, absurd: if there are in fact companies which can only survive by being on a cable system, and there are more of these companies than there is bandwidth, some of them would theoretically go out of business in any event, whether that "life or death" decision was made by the cable operator or a lottery wheel. The difference is that a lottery wheel (or a first-come, first-served policy) is indifferent to quality while a cable operator has every incentive to seek out the best and most innovative supplier.

The real flaw in this argument, however, is the assumption that there are a large number of firms, offering a wide range of services which can only be delivered via a cable system. We have already established that such a situation in no way exists for home entertainment services such as premium movies and the like. Are there, however, enhanced services for which cable delivery is the viable option?

To answer that question, NCTA commissioned a study to the market and alternative delivery systems looked at from a legal, economic and engineering vantage point. Heading up the study was Alfred E. Kahn, one of the leading regulatory economists in the country and no stranger to this Committee; in addition the legal analysis was done by a leading communications attorney, Harry M. Shooshan III, while the engineering perspective was furnished by Charles K. Jackson.

The study identifed the major enhanced and video serivces which can be delivered by cable and then attempted to rate how well each service could be delivered by alternate distribution technologies. The results—demonstrated by a series of matrices—prove conclusively that there is no such animal as a business which will fail solely because it cannot utilize a cable television system.

I believe this is the most comprehensive study of its kind ever undertaken. Because it debunks a lot of myths about the market power of cable television, I will not ask you to take my word for the results of that study nor the thoroughness with which it was conducted. I am including with my testimony this study and urge you to read it with a critical eye. If you do, I am confident you will come to the same conclusions:

There is nothing to be gained by a mandatory commercial access policy;

The consumer would be poorly served by such a policy; and

There are more than ample distribution alternatives for every entertainment and enhanced service cable can offer.

PLEASE NOTE: THE KAHN/SHOOSHAN/JACKSON STUDY IS ATTACHED AT THE END OF THIS PREPARED STATEMENT.[1]

Mr. Chairman, Members of the Committee, we have covered a lot of ground today, and I very much appreciate your attention. Let me summarize what I have been saying today. You have correctly perceived the need to establish a national policy toward cable television, and quite rightly consider cable to be part of an overall national telecommunications network.

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[1] The study has been retained in the committee files.

You believe that cable's growth and development should be encouraged and that unnecessary and duplicative regulation should be eliminated. You want cable to be able to compete in the market-place: not with any favored status over its competitors, but on equal footing on a level paying field. To that, all I can add is "Amen"!

We have discussed the facts and figures which make up an indisputable portrait of a market-place already filled with competition. It is a market-place where new competitors are entering almost every day, using technologies which only a few short years ago existed only in some scientist's imagination. The American people are benefiting enormously from all this innovation, and the federal government is doing its part to see that these new services are encouraged by deregulation at the federal level and preclusion of substitute regulation at lower levels of government—except in the case cable television. You have recognized the need to do something about this unintentional oversight.

All we ask is a chance, a fair chance, to compete in this vigorous market place. It seems to me that there are only two ways to do that: either all our competition should be made liable to the same level of regulation and special taxation as is cable television, or the federal government should see that those special burdens which only cable must bear are lifted. Lest there be any doubt that we do in fact bear special burdens, I would like to reveal one incredible figure to you. In a special study just completed, the firm of Ernst and Whinney, one of the largest and most respected public accounting firms in the nation, has determined that 20 percent of a cable company's total investment expenditures, or $5.60 per month per subscriber, are directly attributable to the special layers of regulation applied only to cable. Need we say more?

ADDENDUM: SUMMARY OF NCTA POSITIONS

While I promised at the outset that I would not provide a detailed analysis of S. 2172, I believe it would be useful to provide for the record a very brief summary of the National Cable Television Association's position on the major issues addressed by the bill.

Cable system ownership

NCTA believes that neither the FCC or the Congress has developed sufficient information on the potential competitive impact of an elimination of the network and/or the co-located broadcaster crossownership rules to make a reasonable and informed decision on such a fundamental public policy question at this time.

The NCTA urges the Congress, just as it urged the FCC, to postpone consideration of these crossownership issues until such time as it has developed the necessary sociological, economic and legal research on the public policy implications on any changes in the current rules.

The NCTA supports the concept of reciprocity in the matter of foreign ownership of U.S. cable systems, and urges that the bill be amended so that the FCC is instructed (rather than merely authorized) to issue reciprocity rules.

We oppose cable ownership by any level of government except in those instances where no private cable company is willing to provide service.

National policy should establish the concept of renewal expectancy so that a franchise cannot be arbitrarily taken from an operator who has met the terms of his original franchise agreement. Should the city wish to award a new franchise to another private company, the original operator should be allowed re-franchise under the same conditions.

Should the Congress be unwilling to prohibit governmental ownership entirely, then at a minimum cities should be prohibited from using tax exempt bond financing to buy or build a cable system on the grounds that such a practice involves a subsidy, paid for by all the taxpayers, for a non-essential service in a handful of cities.

Should a city attempt to buy out an existing cable system, the purchase should be made at fair market value, which includes good will and the value of the system as an on-going business entity.

While we support the concept of prohibiting telephone companies from offering cable services within their service areas, we are concerned that the waiver provisions (in cases where telco cable service would "provide additional media diversity and competition") could be used to allow the BOC's to offer cable within their service areas. While S. 898 contained identical language, the waiver would have only been applicable for independent telco's since AT&T (which at that time included the

BOC's) was explicitly forbidden from providing cable service. As a result, we believe this waiver provision should be removed from the bill or, at the very least, tightened considerably to prevent the BOC's from using it to circumvent the larger prohibition in the bill.

We believe that the new AT&T should be excluded from providing any sort of information publishing services so long as it maintains its monopoly control over the regulated long-lines industry. The ability of AT&T to use its disproportionate market power—created and sustained by its monopoly control of long-lines—to enter and then dominate the information publishing field must be prohibited. Should AT&T lose—as AT&T itself claims it will—its monopoly in long-lines, then then the Congress should consider the removal of some or all of the restrictions against entry into information publishing services.

Access—public/educational/government (p/e/g)

NCTA is committee to the concept of providing ample cable access to governmental bodies, educational institutions and community groups. Indeed, we believe that channel capacity provided for governmental access should be available not only to local officials, but to those serving at the state and federal level as well. The cable industry is proud of its achievements in this area, and believes that cities have not had a problem in arranging access to cable systems.

The problem is not that cities and community groups have trouble gaining access to cable, but rather that through the franchising process cities are demanding free of charge, channel capacity far beyond any showing of reasonable need or ability to utilize. Across the country cable systems have supplied P/E/G channel capacity which sits unused or substantially under-utilized.

Because channel capacity dedicated, but not utilized, for P/E/G purposes deprives the consumers of other services they could be receiving over cable, we believe the federal government should not establish a floor for P/E/G access as this bill does, but rather address itself to setting a reasonable ceiling on the channel capacity which must be provided for these purposes.

NCTA supports the idea of allowing the cable operator to program those P/E/G channels which the city is unable to program.

Access—commercial

NCTA opposes any mandated commercial access policy at any level of government on the grounds that there is no demonstrated problem or need, and virtually no likelihood that a problem will occur in the future given the growth of new and improved delivery systems apart from cable (e.g., multi-channel STV, low-power television, SMATV's Microband proposal for 15 channel MDS in the major markets, DBS and fiber optic cable).

Cable already faces an onerous federal access policy for which it receives no compensation in the form of the FCC's must-carry rules. Other channel capacity is removed from an operator's control through P/E/G access requirements and for technical reasons (e.g., potential aeronautical interference).

The public is not well served by a mandatory access policy which relies on any sort of first-come, first-served basis. "First-on" may not provide the most advanced, most competitive or appealing programming or services available in the marketplace. Faced with penetration rates averaging only 50 percent, cable operators have every incentive to utilize their channel capacity in ways which maximize the public benefit in order to keep and hopefully exceed their 50 percent penetration. The market works best when the cable operator can select what services will be offered since it is the cable operator who lives or dies by the ultimate decision of the cable viewer in the market-place. Fears of a single company dominance of cable services are completely unfounded since even the largest vertically integrated companies offer only two or at the most three programming services.

Must-carry rules

In a good-faith effort to reach an agreement on the compulsory license, NCTA agreed to the codification—with limitations and exceptions—to the current FCC must-carry rules. We continue to support the compromise as embodied in H.R. 5949, the cable copyright bill, and therefore urge the Senate not to include any must-carry language in S. 2172.

Cable believes that it is no longer "ancillary to broadcasting", but a competing medium of telecommunications. Must-carry puts cable at a competitive disadvantage to broadcasters, limiting the made-for-cable programming by tying up channel capacity and expanding the broadcasters' markets at no cost to them. The installation of simple and inexpensive "A/B" switches would enable viewers to continue to receive broadcast signals while at the same time giving them a wider selection of cable services.

Rate regulation

Rate regulation of any kind should only be allowed in situations where a minimum complement of broadcast signals (defined as the three networks and one PBS) is not reasonably available off-the-air.

Where rate regulation would be allowed pursuant to the paragraph above, such regulation could only apply to that level of cable service which contained signals of the three networks and one PBS, and inclusion of any other service in that regulated level must remain at the discretion of the cable operator.

Regulation pay and enhanced services should not be allowed under any circumstances.

Franchise fees

The FCC should be instructed to establish a ceiling on franchise fees. However, we believe that the FCC should be given further guidance in determining that ceiling is "reasonable" by requiring that the ceiling not in any event exceed the costs of a reasonable level of city regulation of cable. Furthermore, the franchise fee should be defined to include all other fees and special taxes which are imposed only on cable operators.

Subscriber privacy

NCTA is strongly committed to respecting and maintaining subscriber privacy, and believes the record of the industry in this regard is excellent. We believe that it would be a mistake, therefore, to attempt to address such issues legislatively other than as a general statement of intent. Changes in technology are occuring so rapidly, that tying strict standards to today's state of the art may be made completely obsolete a few years later.

Professsional sports

We strongly oppose any effort to expand professional sports' ability to force cable blackouts of competing league sporting events. Not only have the professional sports owners not demonstrated any actual (as versus alleged) problem, but it is anti-consumer as well. The owners' argue that given the choice between going to a ball park to see a live game between two poor teams or staying at home and watching a televised game between two good teams, fans will choose the latter. Not only can they not prove this does happen, but it suggests that the team owners are unable to (1) generate any local team loyalty and (2) make arrangements, as their anti-trust exemptions allow, to keep a competitive balance in major league team sports. Moreover, by this logic, good movies should be kept out of town so that people will be forced to support bad movies.

Second, as professional sports teams move to pay-TV, they put the average working man in a difficult position: he either pays to see the game live or pays to see it on television. He would no longer be able to see another team play as part of his basic cable package.

Pole law

NCTA strongly supports the extension of the pole attachment law past its scheduled expiration date in 1983, and believes that publicly and cooperatively owned utilities should be included as well. Just like the cities hold monopoly control over the public rights of way, utilities have a monopoly on pole attachments. To a cable operator, without utility poles there can be no cable system. So absent a pole attachment law a cable operator must pay whatever monopoly price utility decides to charge. Not only is there no reason why publicly and cooperatively owned utilities should not be included, but recent experience shows that many of these utilities are engaging in price-gouging.

Attachments.

CHART # 1

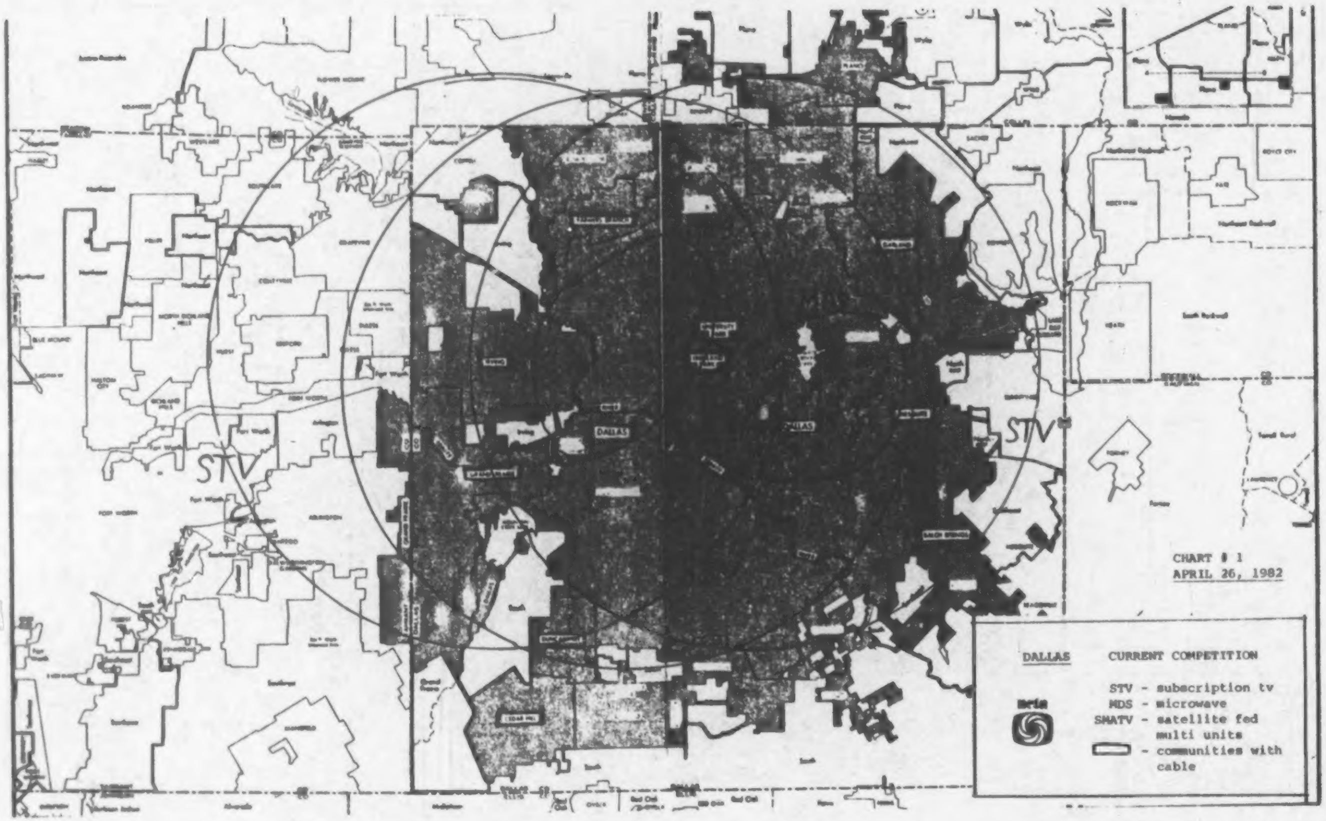

STV
STV
DALLAS
DALLAS
DALLAS
CURRENT COMPETITION
STV - subscription tv
MDS - microwave
SMATV - satellite fed multi units
▭ - communities with cable

CHART # 1
APRIL 26, 1982

CHART # 1A

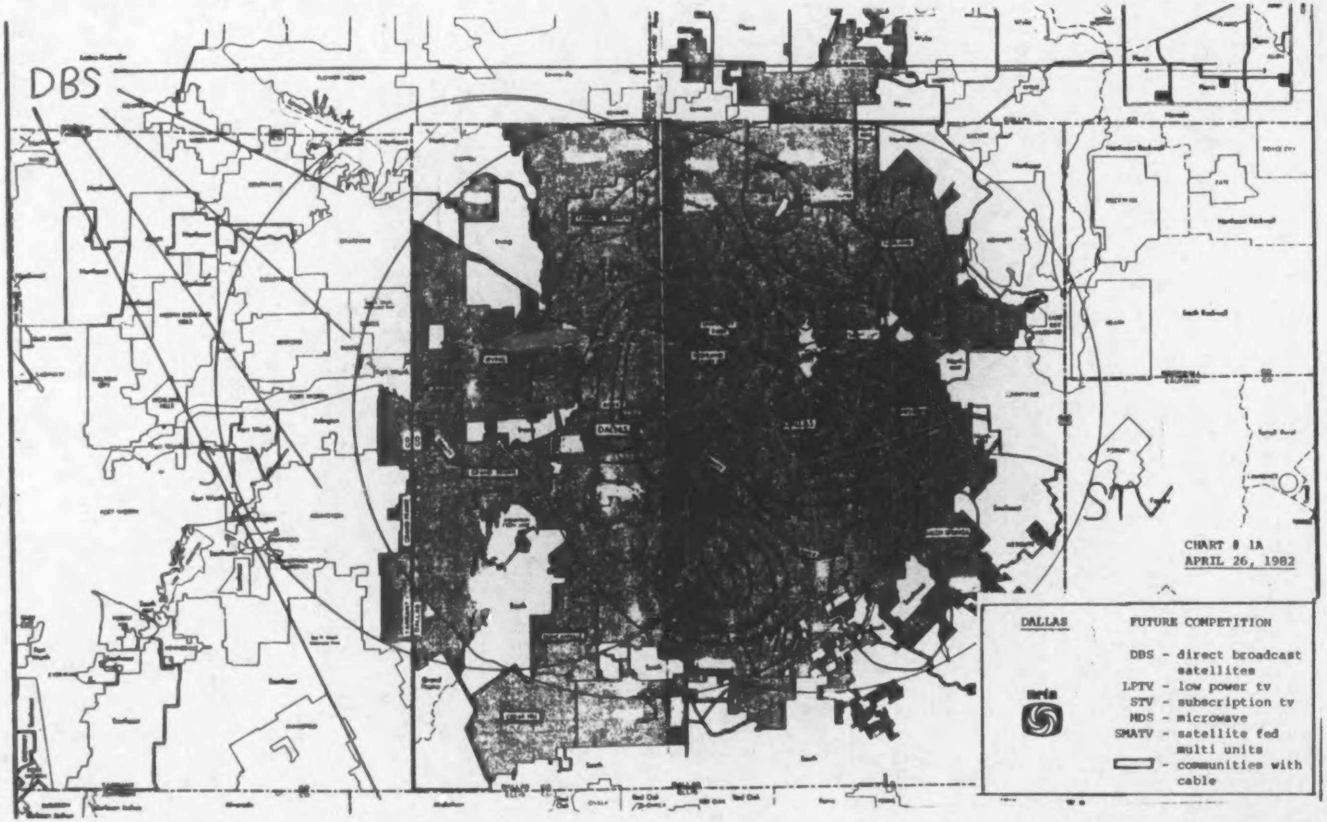
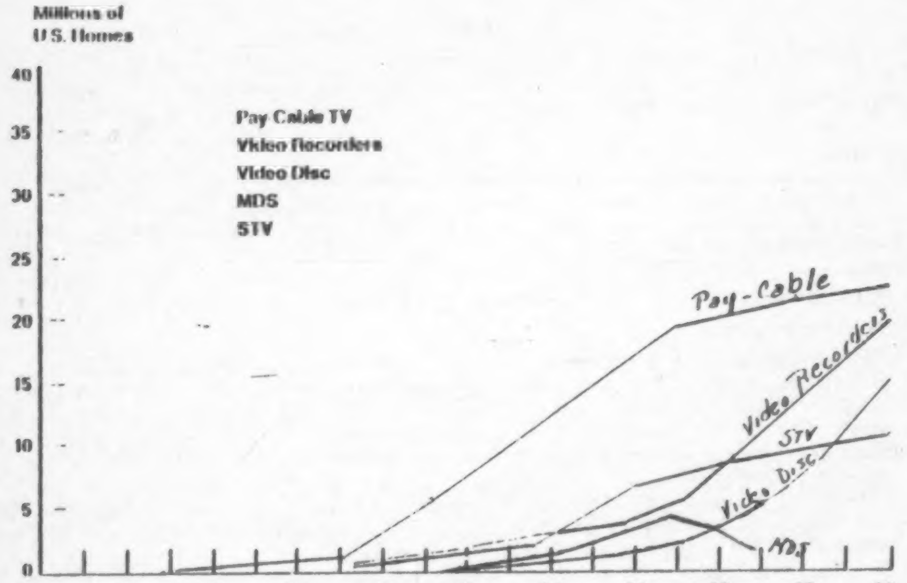

DBS
STV
CHART # 1A
APRIL 26, 1982
DALLAS
FUTURE COMPETITION
DBS - direct broadcast satellites
LPTV - low power tv
STV - subscription tv
MDS - microwave
SMATV - satellite fed multi units
▭ - communities with cable
DALLAS

CHART 2.—QUANTIFYING COMPETITORS IN MAJOR MARKETS

	Dallas	Phoenix
Cable television	2,000	24,000
Subscription TV (STV)	109,000	42,000
Microwave (MDS)	10,000	37,000
Satellite Fed multi units (SMATV)	5,000	3,000
Total	126,000	106,000

CHART # 3

Growth of Television's New Distribution Channels



Source: The Yankee Group

A LOOK AT THE MARKETPLACE

1. *No scarcity of delivery mechanisms and competing services*

Consumer—alternatives from which to choose.
Program distributor—alternative methods for reaching consumers.

2. *Cable neither a monopoly nor an essential service*

Only 54 percent on those who could subecribe do subscribe.
Competitive inroads into traditional cable market by: SMATV-STV-DBS and Cassettes-LPTV-Discs.

3. Result

Programmer—many pathways competing with each other for product.
Consumer—choice among programs, level of service and price.

POLICY CONSIDERATIONS

1. Look at what is, not at what was

Cable highly competitive.
More competition coming—therefore:
Justification/need of city regulation limited.
Quasi-common carrier regulation not justified.

2. Consumer impact of unnecessary regulation

20 percent of sample system investment expended on regulation.

3. Equality of regulation among competitors

Cable regulation: rates—franchise fees—access to channels—use of channels.
Competitors; regulation: none of the above.

THE IMPACT OF COMPETITIVE DISTRIBUTION TECHNOLOGIES ON CABLE TELEVISION

INTRODUCTION

The National Cable Television Association (NCTA) commissioned Browne, Bortz & Coddington (BBC) to study the impact of competing pay television technologies on the cable television industry. The study includes three primary components:

Survey research measuring the existing impact of single channel subscription television (STV) service.

Estimation of the likely effect of increased competition (e.g., multichannel STV, multipoint distribution services, direct broadcast satellities and satellite master antenna television) on urban cable television systems, utilizing secondary source forecasts of consumer demand for multiple premium channels.

Assessment of the financial impact of competing technologies on cable system economics under a range of subscribership assumptions.

Research outline

Survey research was conducted in two greater Los Angeles cable franchise areas, one with a mature cable system established prior to availability of STV service, the second with an early constructed cable system. The objective was to compare STV penetration in the two areas to gain insights as to how cable will fare in various competitive settings. Secondarily, the survey was designed to gather subscriber and non-subscriber perceptions about Los Angeles area premium television services.

Section I of this report focuses on the awareness of, and demand for, non-broadcast television services in the two Los Angeles area franchises. A more detailed overview of the study framework is also presented.

In Section II, survey respondent interest in, and satisfaction with, cable and STV are reviewed. Topics discussed include reasons for subscribing to a non-broadcast television service, opinions regarding price and programming, and overall satisfaction with the service received. Respondent interest in a multichannel STV service is also reported.

Section III reviews secondary source data on subscriber demand for multiple channels of premium programming. Results suggest that demand for premium channels of non-broadcast programming is strong and increasing. Correspondingly, however, relatively few channels of premium programming can satisfy most expressed consumer demand. The implications of this fact for multichannel services competitive with cable are discussed and hypothetical penetration rates for such competitive multichannel services are estimated.

Section IV, the final section of the report, utilizes a cable industry financial model to estimate the economic impact of competing technologies on urban cable television systems.

Appendix A presents a brief overview of the Los Angeles area television market. Appendix B details the methodology used for survey design, sampling and execution. A detailed description of the sample is presented in Appendix C, a copy of the survey instrument in Appendix D. Appendix E contains pro forma financial data used in estimating the impact of competitive technologies on cable system economics.

Limitations

The time and resource constraints imposed on this research resulted in a relatively small survey sample size. This is particularly true for certain subcategories of the overall sample (e.g., STV subscribers) and where data are cross tabulated. Statistical test results are provided to aid in properly understanding the data presented. Nevertheless, results should be interpreted with caution and small percentage differences may not be significant.

Survey research was conducted in only two franchise areas in one market. Results may therefore not necessarily be representative of the competitive situation in other communities.

Acknowledgments

BBC wishes to thank Ms. Char Beales and the NCTA research staff for their help with this project. The assistance provided by a major multiple system operator in running its computerized financial model with BBC subscriber inputs is also greatly appreciated. Finally, we appreciate the cooperation of cable television operators in the Los Angeles area, particularly those in the two franchise areas where research was conducted.

The United States cable television industry is entering a period of increasing competition from alternative distribution technologies such as subscription television (STV), multipoint distrubution services (MDS), satellite master antenna television (SMATV) and direct broadcast satellites (DBS). The advent of multichannel capability for these services is an area of particular concern to cable operators, ending cable's monopoly as a multichannel program supplier. The objective of this study, funded by the National Cable Television Association, is threefold:

To quantitatively measure the impact of existing single channel STV and MDS on cable industry subscriber levels.

To forecast the future impact of multichannel competitors (e.g., DBS, STV, MDS) on cable industry subscribership.

To estimate the impact of competing services, both single and multichannel, on the financial viability of cable TV in an urban setting.

Existing STV impact

The present impact of STV on cable industry subscribership was estimated through survey research in the Los Angeles area, the most mature of STV markets nationally. Residents of two cable franchise areas were surveyed, one served by a mature cable system operational prior to the launch of STV, the second served by a new build system. This survey structure was utilized so as to quantify the advantage STV will gain by being the first premium television service in many major urban markets (e.g., Chicago, Detroit, Washington, D.C.).

Survey results indicate single channel STV can sustain a high level of subscribership in an area it penetrates prior to cable TV service becoming available; conversely, however, STV appears to have a difficult time attracting subscribers where cable is simultaneously available at the time of STV launch. In the case study example, only three percent of homes passed in the mature system have STV only compared with an estimated 14 percent in the new build case:

	Mature system		New build	
	Number	Percent	Number	Percent
Cable only subscribers	79	38.0	67	28.3
STV only subscribers	6	2.9	33	13.9
Both cable and STV subscribers	10	4.8	8	3.4
Nonsubscribers	113	54.3	129	54.4
Total	208	100.0	237	100.0

In addition, almost five percent of mature system households and more than three percent of new build system households subscribe to both STV and cable. Although too much should not be inferred from comparing just two systems, it is interesting to note that the percentage of households not subscribing to any service (54 percent) is identical in the two systems; STV growth appears to be directly at the expense of cable penetration.

The difference between STV subscribership levels in the mature and new build systems is statistically significant.

The percentage of STV subscribers who convert to cable when cable becomes available to them is uncertain. Cable operators interviewed as part of this study claim conversion rates of 60 to 90 percent. A very rough approximation from the survey data would suggest the correct figure is closer to 50 percent.

Consumer satisfaction with nonbroadcast television

In addition to subscriber information, a variety of other data were obtained as to awareness of, and satisfaction with, alternative nonbroadcast television distribution modes. Key results include:

Both cable and STV have achieved a high awareness level among survey respondents. More than 85 percent of those surveyed have heard about their local cable company; almost 95 percent have heard about STV.

STV appears to use television and other mass media more effectively than cable. Approximately 45 percent of respondents are aware of STV through television compared with only 16 percent for cable. Word of mouth awareness is important for both TV modes; about 40 percent of those surveyed say they had heard of cable or STV through friends. Several cable industry officials interviewed for this study suggested joint marketing among metropolitan area cable systems as a means of more efficiently utilizing the mass media.

STV subscribers initially purchased the service to enhance viewing options, primarily with uninterrupted movies and sports. Program diversity is also most frequently mentioned by cable respondents. One of three cable subscribers cite improved reception as a reason for subscribing.

Both cable and STV subscribers are generally satisfied with their supplemental program service. Approximately 70 percent of STV subscribers believe their operator does a "good" job; more than 60 percent of cable subscribers give their operator a similar rating.

About half of STV and cable subscribers believe they pay the "right amount" for their service. The similarity in responses is somewhat surprising, considering that basic plus a single pay cable service is available for less than STV.

Cable subscribers are somewhat more satisfied with the programming they receive than are STV subscribers. For example, 48 percent of cable subscribers are "very satisfied" with the kinds of programming available over cable compared with only 38 percent of STV subscribers.

These data suggest cable marketers interested in converting a high percentage of STV subscribers should focus on programming issues, an area where cable subscribers are more satisfied than STV subscribers. STV subscribers mention poor selection and quality of movies, limited variety and varied program quality (e.g., good one month, bad the next) as problems with their service. Secondarily, cable marketers have not convinced STV subscribers of the clear price advantages of multichannel cable compared with higher priced, single channel STV.

Demand for competitive mutichannel services

No empirical data are available to provide reliable subscriber penetration estimates for multichannel services in competition with cable. To provide a range of subscriber penetration forecasts for use in the financial modeling section of this report, BBC analyzed the theoretical and empirical data on consumer demand for multiple channels of non-broadcast programming. These data suggest that relatively few premium and non-premium channels can satisfy most expressed demand for non-broadcast services. For example:

Arthur D. Little's demand study for Comsat General Corporation shows demand increases with the number of DBS channels, price held constant. However, the marginal addition to demand decreases with the number of channels, implying decreasing marginal value.

Cable franchise applications demonstrate a high level of consumer demand for the first premium service, steadily decreasing demand for the second, third and subsequent services. This is supported by several survey research studies.

Data from the pay TV Census confirm the decrease in demand for subsequent premium TV services after the first in both typical and new build cable systems.

Nielsen viewership data indicate that viewing of premium cable channels is comparatively high, viewership of other cable program services relatively low.

Taken together, these data imply that a large portion of consumer demand for non-broadcast program services can probably be met by a four or five channel service, suggesting multichannel STV, MDS, SMATV or DBS can capture a significant market share. BBC survey results in Los Angeles bear out this contention. Almost 20 percent of existing cable subscribers say they would consider switching from cable to a three channel STV service, priced "less than twice" the present single channel level. About 40 percent of non-subscribers to either cable or STV would be more likely to subscribe to such a multichannel service, even at the higher price, than they presently are to single channel STV.

It is our judgement that cable television will remain the dominant technology for distributing video programming, even if multichannel STV, MDS and DBS develop as planned. The high channel capacity of state-of-the-art cable systems is an advantage over four to five channel competitors, even if the incremental consumer demand attached to these channels is small.

The key element is price. A five channel program package is not substitutable for a 50 channel cable package at the same price. However, if the price of the five channel package is reduced by the marginal value of the other 45 channels (which is modest) then substitution will occur. At present, the prices likely to be charged by multichannel MDS, STV, SMATV or DBS services are uncertain. The recent Microband Corporation of America proposal to the FCC, however, demonstrates breakeven for five channel MDS below $20 monthly, a price level which could be competitive with basic plus pay cable in certain situations.

In the absence of operational data, the precise penetration of competitive multichannel technologies in areas where cable is also available can only be hypothesized. For purposes of financial analysis, BBC assumes competing multichannel technologies will reduce basic cable penetration by from five to 20 percentage points. The exact figure will undoubtedly vary widely on a market by market basis although, in our opinion, the five to 20 percent range should bracket the situation under most likely development scenarios. The economics of competing technologies are such that they can be profitable with a relatively small share of the total premium television market.

Financial implications

The financial impact of competitive technologies on cable system economics was estimated through the use of a major multiple system operator financial model. Results indicate substantial financial effects, particularly in terms of net income. In a 200,000 home market, for example, even a modest five percentage point decrease in the basic to homes passed penetration rate causes revenues and net income to decline by $63 million and $13 million respectively over a 15 year franchise life. Comparable figures for a 20 percentage point penetration loss, probably a maximum level of impact, are $250 million in revenue, $55 million in net income.

Capital expenditures and operating expenditures both decline at a lower percentage rate than subscribership, indicative of fixed cable system costs. The net income loss, however, is more than proportional to the loss of subscribership. In other words, a 10 percent decline in cable penetration due to competitive technologies will result in a more than 10 percent decline in cable system net income.

THE COST OF CABLE TELEVISION REGULATORY AND FRANCHISE REQUIREMENTS: A PRELIMINARY ANALYSIS

INTRODUCTION

A recent Federal Communications Commission report described "cable television" as "nothing more than a way of carrying electronic signals into homes.[1] Today, however, cable is increasingly referred to as a cost effective and efficient means of broadband communications which is able to provide a wide array of telecommunications and information services to homes, businesses, factories, schools, government buildings, and banks. It is, in other words, much more than a television signal delivery system.

Throughout its short history, cable has faced more diverse types and levels of regulation than almost any other U.S. industry. From its beginnings in the late 1940s and early 50s, cable has had to contend with a complex variety of federal, state county and municipal regulatory requirements, most of which have not been imposed on its competitors, principally the broadcast industry and the new providers of alternative video services.

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[1] See "FCC Policy on Cable Ownership," a Staff Report, FCC Office of Plans and Policy, November 1981, page 9.

The introduction of S. 2172, by Senator Barry Goldwater, R-AZ, Chairman of the Senate Subcommittee on Communications, represents the first attempt by the U.S. Congress to create a clear and precise statutory framework for the cable industry. Although this proposed legislation is a laudable attempt to clarify the uncertain regulatory and legal status of the cable industry, the issues raised in the bill must be approached carefully to ensure that the level and types of regulation to be imposed upon the cable industry produce benefits that outweigh the associated costs.

The impetus to regulate the cable industry stems from a variety of concerns:

Cable's competitive impact on the broadcast industry;

Cable's perceived potential to exercise monopoly power in its service area, even though cable is not regarded as an essential service and has a number of current and potential competitive substitutes including broadcasting, telephone services, newspapers, movies, video cassettes and discs, subscription television, multipoint distribution service, direct broadcast satellites, and others.

Its potential to provide a ready source of cash for financially strapped cities or counties, through franchise fees on other commitments;

Its ability to provide political, social, educational, religious, and other groups with media access and visability.

Although each of these issues must be carefully considered in formulating any legislative proposal, recognition should also be given to the costs that a mandatory or permissive approach to developing multitiered regulation imposes on both the cable industry and, ultimately, on its consumers.

This preliminary study provides estimates of the costs that have been, or could be, imposed on cable systems and their consumers by various types of regulatory requirements. It provides some preliminary empirical evidence on one of the major issues involved in developing a much needed statutory framework for the cable industry.

This study estimates the regulatory costs to a cable system and it consumers in a representative recently franchised cable system. Accounting data were analyzed in order to generate the costs. The study focuses on those regulatory/franchising costs imposed on cable television systems that are not imposed on competitive services, such as Subscription Master Antenna Television (SMATV), Multipoint Distribution Service (MDS), Subscription Television (STV), Direct Broadcast Satellites (DBS), over-the-air broadcasting, video discs and cassettes, etc. These competitors to cable are typically not subject to any regulation at the local and state levels and do not incur the costs imposed on cable systems.

The analysis includes a discussion of the assumption that many franchise imposed costs are regulatory as opposed to competitive costs, for example, local origination studios, access channels and the like. Estimates are provided of the extent to which these facilities are used. Costs associated with the different types of regulation imposed upon cable systems are generated for local origination requirements, hook ups to schools and government offices, access channels, franchise fees, etc.

The results of the analysis show that the costs imposed on this cable system by its franchising requirements are substantial. Approximately 22 percent of total subscriber revenues are used to cover costs which the system would not have incurred without the franchise requirements. When the system is mature, this will amount to approximately $5.60 per month per subscriber. Although these numbers must be construed as rough estimates and are dependent on the validity of the assumptions employed, we believe they are reliable in demonstrating the order of magnitude of the regulatory costs incurred by this system. These results may also be conservative because this system is not subject to additional state regulatory requirements, it has never incurred the costs associated with a rate increase request, and the costs associated with certain francise requirements, such as construction timetables, could not be reliably estimated.

SUMMARY OF FINDINGS

Two methods were used for establishing the regulatory costs for this typical major market cable system:

1. Direct costing methodology

A regulatory cost adjustment was made for fixed assets, which amounted to approximately $15 million, and an adjustment was made for expense items, which amounts to approximately $5 million. This has a significant effect on the amount of revenue required per subscriber if the system is to make a reasonable return on its investment.

Assuming a 20 percent rate of return on the system's net assets plus expenses, the monthly revenue required per subscriber amounts to $25.83 with regulatory costs included. These regulatory costs include the local origination requirements, two-way capability, system development costs, and franchise costs.

If regulatory costs are excluded, a 20 percent return on total net assets plus expenses would require revenue of $20.25 per month.

The difference per subscriber per month due to regulatory costs is $5.58 (approximately 22 percent of subscriber revenues).

Assuming an 18 percent rate of return on total net assets plus expenses with regulatory costs included, the revenue requirement per subscriber amounts to $24.83.

Without the regulatory costs, the revenue per subscriber per month falls to $19.50.

The regulatory costs per subscriber per month amount to $5.33 (approximately 21 percent of subscriber revenues).

2. Relative usage methodology

The franchising authority required that 9 of the system's 35 channels—or 26 percent—be dedicated for the exclusive use of public access. It was assumed, therefore, that 26 percent of the system's cost could be designated regulatory costs.

The findings under this approach are not dissimiliar to the direct costing results.

Assuming a 20 percent rate of return with regulatory costs included, the monthly revenue per subscriber amounts to $25.83.

Taking the regulatory costs out of the equation, the monthly revenue per subscriber falls to $19.75.

The regulatory costs per subscriber per month amount to $6.08 under this methodology (approximately 24 percent of subscriber revenues).

Major costs not included

The two methodologies used are conservative to the extent that several major cost items were not included. Examples include:

Pole attachment rentals.

New local origination facilities that were specified in the franchise agreement but are not yet on the system's books.

The addition of 5 channels in order to offer pay services that would not have been necessary if the system had not been required to provide 9 little used public access channels.

Additional construction costs involved in building the system at the speed required by the franchise agreement (overtime pay and increased costs of materials).

A requirement to pre-pay $1 million as a franchise fee which will result in a minimum loss of interest income of $330,000 over a ten-year period.

Cost of regulation

It is clear that the costs of regulation are high—between $5.00 and $6.08 per month per subscriber.

Regulatory costs can hurt customers because they result in higher rates, lower penetration, reduced recovery of fixed costs, and possible customer migration to competitive alternatives. Regulatory costs affect the cable operator because they decrease overall return levels and reduce profits, reduce the availability of capital with which to finance improvements, and generally inhibit overall cable development.

Senator GOLDWATER. Thank you.

Would you please leave those charts there, because I want to get back at the last point you had here.

All right. The Honorable Helen Boosalis from Lincoln, Nebr.

Ms. BOOSALIS. Thank you, Mr. Chairman, and members of the subcommittee:

My name is Helen Boosalis and I am mayor of the city of Lincoln, Nebr. I am here this morning on behalf of the U.S. Conference of Mayors, of which I am president. The conference is composed of the Nation's principal cities.

The conference is pleased to be here today to provide this subcommittee with our views regarding the future of cable TV regulation. As this subcommittee knows, few issues arose as much concern and intense interest on the part of mayors.

Prior to my formal remarks concerning cable television regulation and cities, I wish to thank you, Mr. Chairman, on behalf of all mayors, for this hearing and for your strenuous efforts to insure that it would occur. You promised us our day in court and we are pleased to be here this morning to present our case.

The conference has consulted widely in recent weeks with city officials and citizens all across the country on the various provisions of S. 2172, the Cable Telecommunications Act of 1982. We come to you this morning with praise, with suggestions, and with questions.

Mr. Chairman, the relationship between cable television and local governments is never an easy one, but on balance the relationship works well. The wiring of urban America is occurring and at a rapid pace.

The franchising process, for example, is a model of the free enterprise system working feverishly. In this instance, local governments, acting as the customer, describe and define the quantities and specifications they seek in the product, the cable television system. The private cable companies then compete for the franchise. Not only do they seek to meet the terms set by the local government, but also as part of the competitive process they almost always seek to exceed them. Through this procedure, the marketplace insures the best possible cable television system which can be sustained by the various jurisdictions.

Following the award of the franchise, local government oversights acts to guarantee effective implementation of the franchise agreement. In my own city of Lincoln, our cable franchise has been in place for more than a decade. Periodically, the company requests a rate increase for those price regulated services. At that time, the city seeks to determine of the key provisions if the franchise agreement are being appropriately followed and reviews the company's finances to determine the merits for any rate adjustment.

The local government oversight role helps to insure that the public interest is upheld. Theoretically, of course, it is possible for a dissatisfied cable customer to give up the service. But in the real world, because of the importance which full cable service takes on, that is not a good choice.

It is in this context in which our comments regarding S. 2172 are based. The system is working well. We want to insure a future framework for cable television in which it continues to work well.

Mr. Chairman, S. 2172 is a credible beginning and by far the most well thought out approach to date in attempting to legislate from the Federal level the status of cable television in our society. There are several key points within that bill which most local officials would view from a positive perspective.

S. 2172 permits local governments to regulate the rates for basic service, defined as the retransmission of broadcast signals, and any other service as determined by the operator. This is appropriate and should certainly be viewed as the absolute floor of local rate regulation. Local governments view rate regulation as the key ingredient to protecting the public interest.

S. 2172 calls for those systems having 20 or more channels to dedicate 10 percent of those channels for access by educational, governmental or public programers, and 10 percent for leased access. Again, this seems to be a reasonable approach and an appropriate minimum to insuring adequate access to the system from a wide variety of programers.

S. 2172 does not bar municipal ownership or acquisition of cable television systems. This also is a good and necessary element of this proposal. The Conference of Mayors is neither an advocate nor an opponent of municipal ownership across the board. Rather, we recognize that it is an option which must remain available at the local level in response to unique circumstances. We remain convinced that it is an option that would be rarely used, if at all.

Mr. Chairman, from the point of view of the cities, S. 2172 raises some important and interesting issues and questions for your consideration.

Although the grants of authority to local governments for basic service regulation, municipal ownership, and leased and public access are clear, mayors are still troubled by the dominance and looming presence of the Federal Communications Commission in cable TV regulation, as would be the case under the legislation. In an era of deregulation, when the Commission is trimming its sails with respect to a great deal of its mandate, it is perplexing to us that it now be granted essentially exclusive jurisdiction over cable, except where specifically given to other entities.

It seems appropriate that the reverse be the case: If the Congress has specific missions for the FCC, those should be prescribed instead of a relatively random, broad-sweeping license to regulate.

As the mayor of a city which has had a cable franchise for many years, I am concerned that S. 2172 grants powers to the FCC which would retroactively declare null and void provisions of existing franchise agreements if they are in conflict with some future Commission ruling. That seems excessive to local officials and is bound to create considerable turmoil if it is exercised in reality. For instance, many franchises call for local acquisition at less than fair market value for cause. This provision would be voided by S. 2172.

I have a short proposal. As currently drafted, S. 2172 might be interpreted by the Commission or others to bar local governments from exercising the ability to regulate ownership of cable systems to suit particular local needs, such as a percentage local ownership or other specifications.

Although local governments would be permitted to regulate basic service, it is defined in perhaps its narrowest form. Local governments and cable operators should be free to negotiate precisely what is determined by basic service—it should be flexible to adapt to community needs. Simply leaving the definition to operator initiative is not sufficient.

The Commission is permitted to waive the leased access requirements if it deems there are reasonably available alternatives, and the operator can also fold together the public access channels if it considers there to be insufficient demand. This seems to throw into potential jeopardy the status of both access provisions, placing their future in arbitrary terms.

In the matter of franchise fees, there is no evidence of intent by local governments to abuse the power to collect franchise fees. Yet S. 2172 mandates that the Commission set a ceiling on them. A franchise fee is not only a business tax, but it is also compensation to the people for the use of public rights of way.

In summary, these are just a few of the points which cause local officials some concern. Our overriding desire is that the progress we have made, the reality of the wiring of urban America, not be threatened by new laws and regulations, by solutions which seek to meet problems which do not exist.

Mr. Chairman, as the subcommittee considers its options for the future, the Conference of Mayors is hopeful that real consideration will be given to the necessity for legislation. Do we need national cable television legislation, and if so what specific issues need to be addressed? We have attempted to outline some particular concerns and some general ones as well. We hope that our questions can be fully addressed in an open atmosphere before proceeding to the next step.

The conference appreciates the opportunity to meet with you this morning and thanks you again for your courtesy and sense of fairness in seeking our views. We would be pleased to take any questions.

Senator GOLDWATER. Thank you very much.

I might say that in the case time runs out for you we will put your entire statement in the record as if it were read. And I apologize for having to do this, but we have got quite a few people to go through.

All right. Mr. Stephen Effros, you may take the floor.

Mr. EFFROS. Mr. Chairman, thank you for the opportunity to speak today. I am the executive director of the Community Antenna Television Association. I would appreciate it if my comments were put in the record.

Senator GOLDWATER. They will be.

Mr. EFFROS. I find myself in the interesting position of not only agreeing with the complications of the large system operator and also agreeing with the problem of the cities in regulating cable, but being somewhat in the middle in trying to explain that what we are talking about in this hearing are two different types of businesses.

Tom Wheeler was just discussing the problems in Dallas. There are tremendous problems, the competition that exists there. There is no question that the cable industry is now in a competitive mode with other systems around the country, including direct broadcast and satellite and including many other forms like STS, as Tom was mentioning.

But on the other side of that coin, there are cable television systems throughout the United States in the smaller communities, in the rural areas, that bear no relationship to what we are talking about today. They do not bear a relationship to the large channel capacity systems or the access demands or the needs that some cities perceive in terms of their telecommunications program for the future.

I think it is important that we delineate between cable television, the traditional cable television that is serving the country today, and broadband communications systems which are the systems we hear a lot of publicity about and we see a lot of written material and arguing about in the large cities. These are two different industries. If you try to regulate them in the same way or even if you try to write a bill that encompasses them both, I strongly suggest that that bill recognize the difference between traditional cable television systems, which will always exist in the smaller markets, and the broadband communications systems of the few very major large population areas.

There are several aspects of the current bill that we would like to look at specifically. No. 1 is rate regulation. It is in my formal presentation. The problem that the Community Antenna Television Association has with rate regulation is a very simple one. As the mayor just pointed out, rate regulation is not really used to protect the interests of the citizens in terms of rates. Rate regulation is used as a mechanism to review franchises. That was the statement that was just made, that when someone comes in to request a rate that is the time that the city looks at the entire performance of the franchise and sees if they want anything else in the franchise, and so on.

For a large system operator or a small system operator, this puts the cable system in jeopardy in terms of new demands, new requirements, and a regulation. It was amusing, we heard a comment just now that we are all in favor of deregulation. But the cities, with the size of their franchises and oversight committees and rate review committees, have reregulated cable far more than the Federal Government has ever deregulated.

That is what we are concerned about with rate regulation, and the provisions of S. 2172 go somewhat to the point, but could be strengthened.

We also have a concern about the ownership provisions of the bill. The Community Antenna Television Association is against the Federal Government becoming involved in any area that it cannot show there is a need that must be solved, a problem that must be solved. We do not think that the foreign ownership issue fits that category.

As Mr. Fowler said a few minutes ago, this may be a trade tool, but it is not appropriate to use a trade tool in the industry, one small portion of the communications industry—that is, cable television—and give the power over that trade tool to the Federal Communications Commission, as opposed to dealing with that trade issue on a much broader basis.

We think the cities are perfectly capable of deciding for themselves who the owner of the system should be among competitive bidders. We think that that competition should include all forms of competition.

There is one area, however, that we think is a definite Federal question in terms of ownership, and that is municipal ownership. Municipal ownership is very simple; it is socialism. The members of my association quite frankly were very surprised, Mr. Chairman, that you would have something in your bill that would, while not supporting municipal ownership, even allow it.

There is no question that the cities today are having problems. There is no question that they need revenue. But for the cities to be using cable television particularly, a First Amendment medium, as their first intrusion into the private marketplace, there is a serious danger to all of us.

It is an intrusion because cable television is not a utility. Only about 50 percent of the people who have the option of taking cable television actually do take it. This is not a telephone system, this is not garbage collection. This is a First Amendment medium we are talking about here. For the cities or any other governmental entities to start owning or controlling that media we believe is extremely dangerous, and we would hope that you would see fit to change the bill to prohibit municipal ownership.

Thank you very much.

[The statement follows:]

STATEMENT OF STEPHEN R. EFFROS, EXECUTIVE DIRECTOR, COMMUNITY ANTENNA TELEVISION ASSOCIATION

Mr. Chairman, members of the Subcommittee, thank you for this opportunity to testify before you today on S. 2172. I am Stephen R. Effros, Executive Director of the Community Antenna Television Association, better known as CATA. As you know, CATA represents primarily the smaller, non-urban cable television systems throughout the United States. The Association calls itself the "voice of the independent operator"—not because we are made up solely of individual cable system owner/operators, we are not. There are many small and medium sized multiple system operators within the CATA membership. We are the voice of the independent operator because we primarily represent the views of the people who are concerned with the day to day operation of cable television systems throughout the United States, not cable television owners who are also vertically and horizontally integrated parts of larger communications conglomerates.

Our focus is on the reality of operating a cable television system in the political and economic climate of today. It is from that point of view that I would like to present our perspective of some of the provisions encompassed in S. 2172.

To begin with, Mr. Chairman, we think you should be congratulated on introducing a bill such as this one in a manner that allows open debate on the many issues raised. As you know, we supported your efforts to assure that all parties had the opportunity to discuss and analyze the complicated interrelationship of federal, state, and local interests associated with the regulation of cable television. While we do not agree with all the provisions of S. 2172, we believe it to be one of the best initial vehicles for the rational discussion of cable television issues ever introduced in Congress.

S. 2172 is a political document. That is not to say it is bad, but to point out that there are many aspects of it that, to our mind, try to "split the baby" so to speak rather than deal in a straightforward manner with the problems. Rather than go over each section of the bill I would like to highlight two or three provisions that CATA would prefer to see dealt with in a more direct fashion. Those areas, in particular, have to do with rate regulation, foreign ownership and municipal ownership. I am sure that in the ensuing panel discussion following this testimony we will have a chance to discuss many of the other provisions of S. 2172.

RATE REGULATION

As a general proposition it has always been the position of the Community Antenna Television Association that regulation should not be imposed on any business or individual in the United States absent a showing, by the government, that such regulation was essential to the wellbeing of the public. Had the Federal Communications Commission taken that view in the late 1960's and early 1970's with regard to cable television regulation, rather than their "intuitive" regulatory approach, many of the FCC's rules restricting cable television would have never existed. Rate regulation is one example of that intuitive approach. Within five years of adopting rules requiring cities to regulate the rates of basic subscriber services the FCC abandoned its rule, admitting that there was scant evidence to show that such rate regulation was necessary.

We still do not believe it is necessary. Indeed, whenever there have been careful studies of rate regulation of cable television the conclusion has been that the regulation served no real purpose other than as a lever, by the community, for other enforcement objectives. In other words, rate regulation was not really used to protect the consumer from unfair rates, it was used as a negotiating tool by franchising authorities. It should be noted that that is the stated purpose of some franchising officials for including rate regulation in their ordinances. We have no objection to enforcement mechanisms in franchises. Rate regulation, however, is not, in CATA's view, an appropriate one.

While the current text of S. 2172 allows rate regulation by franchising authorities of basic cable service and access channels, it is silent, with the exception of a prohibition on the regulation of leased channel rates, on all the other channel uses: pay cable, data transmission, pay-per-view, and so on. We have been assured by the staff of the Subcommittee that the intention of the drafters was to prohibit all other such rate regulation, but we are constrained to point out that that is not what the current language of the bill says. We would ask that the stated intention be included in the legislation specifically, and that language be added to make it clear that services provided by cable operators to the public, or to other channel users, other than so-called "basic" service and the designated public, educational and governmental access channels shall not be subject to rate regulation by any level of government.

Another difficulty with the rate regulation section of the legislation arises from the definition of "basic service". While it is true that in the past "basic service" included all broadcast retransmissions, that is not the case today. Some non-"must carry" distant television signals such as WTBS and WOR or WGN are marketed separately, or on a so-called "tiered" basis. That being the case, we believe the legislation should be modified, if you insist on allowing any rate regulation at all, to reflect that rate regulation shall only apply to the service provided by the cable television operator that includes the "must carry" television rebroadcast signals as defined by the FCC. Of course CATA also opposes the concept of "must carry" signals to begin with, but that is another debate, for another time.

By modifying the rate regulation section of the bill as we have proposed, we believe the intent of the drafters of the legislation would be fully met. That is, to allow franchising authorities to regulate the rates charged to subscribers for the basic service of seeing local television signals, and controlling the rates charged for public, educational and governmental access uses, while at the same time allowing the free marketplace to determine the rates for all other services now offered or to be offered in the future by cable television or broadband communications system operators.

CABLE VERSUS BROADBAND

In considering this, or any other legislation or regulations on cable television CATA believes it is vitally important that there be a full appreciation of the difference between cable television systems and broadband communications systems. The misunderstanding of this point, we think, is the source of more problems for the cable television industry than any other single thing.

The primary reason for the current frenzied activity at all levels of government regarding cable television is its growth in the major television markets. While cable served only the nonurban areas, or the areas outside the very large television markets it presented no real threat to any other medium and the monetary impact of the systems was negligible. Now, however, with the advent of the major market systems, there is a reevaluation of the potential impact of cable. Along with that reevaluation has come an increase in the expectation of what cable television can do. It is not necessary here to go into all the excesses that have resulted from this process. It should be sufficient to say that the combination of the large cable conglomerates seeking major market franchises against stiff competition combined with a regulatory approach by franchise authorities that encouraged excessive bidding as the criteria for the award of the franchise has resulted in an unrealistic view of the cable television industry.

I do not hesitate to say that I do not believe that some of the franchises currently granted in the major markets will ever be built the way they were promised. The promises, based on the theoretical capability of the technology, have far outstripped the economic reality of cable television. What is being sought, and proposed, is not cable television at all, it is broadband communications. I am not saying that broadband systems will not work. However they must be recognized as very different entities from cable television systems. If that difference is not recognized then we will fall into the trap of creating expectations in the smaller communities at franchise renewal time that simply cannot be reasonably met. That is what is happening today.

Imagine, if you would, a local commmunity demanding that the telephone company install, for free, telephone service in every room of every public building—including all of the schools. Of course the demand will extend to free service on those telephones as well. Then imagine that a further demand, for the "right" to serve the public, is that the telephone company provide a teaching facility, and the teachers to train anyone who wants it in the art of public speaking, or speech therapy. Then, for good measure, add a requirement that the telephone company build an entire dedicated communications system for the exclusive use of the government. All of this, of course, is for "free"! Well we all know what the reaction to such a proposal would be. There would be a loud, and rightful scream from the telephone users, the folks who would actually have to pay for all those "goodies" through their monthly fees—the scream would be so loud and so long that no such proposal would ever get off the ground. Yet those are the very demands that are being exacted of cable companies every day. The only difference is that the government can get away with it right now because the service is not yet being provided, so there is no subscriber base to complain.

The traditional response to this scenario is that if the operators don't like it, they don't have to bid for the franchises. But that misses the point. To begin with the bidding process has so warped the marketplace that it is difficult if not impossible today to determine what will be economically viable and what will not in major city franchises. The only way to find out is to let the marketplace assume a more normal posture, absent the bidding pressure of franchise promises. Secondly, the unrealistic bidding wars that have grabbed all the recent attention are now affecting the more traditional markets, where operators have built a business over the years and have a great deal invested, and now find themselves faced with demands that they simply cannot rationally meet. It is not clear what will happen next. Either they will be forced to sell their systems to "deep pocket" conglomerates or they will fight to legally retain what they have by challenging the authority of the franchisors. I suspect that the latter is already beginning. Something has to be done to correct this process, and S. 2172 takes some important steps in that direction.

The access provisions of S. 2172, as an example, at least present one view of a reasonable requirement. We can argue whether that requirement is too great or not great enough. We can debate whether rate regulation is needed to assure access or not. But one way or another a limit must be put on the bidding wars. Without such a limit we run the risk of the regulators creating an environment that ultimately results in the demise of the regulated. Unlike older communications services, cable is being built in a competitive environment. It will not be the only delivery mechanism into the home, yet it is the only one being subjected to the regulatory and competitive demands I have just outlined.

OWNERSHIP

There are many legitimate questions that can be asked about the extent of the franchising power weilded by cities and states. Does the necessary power to control the reasonable use of the streets and ways carry with it the right to not only set the parameters on how those streets will be used, but also what type of commerce will be conducted? Does the police power include the right of program selection and censorship? We do not think so, yet that is what is happening today in the field of cable television. One thing that CATA believes is clearly within the ambit of the franchising authority is the right to select the franchisee. And that includes a potential foreign franchisee. We believe that the restrictions proposed in S. 2172 on foreign ownership are misplaced.

Initially it should be noted that proposals for foreign ownership restrictions in the field of cable television are not new. It seems that every time there is a spirited franchise fight in a major metropolitan area that includes as one of the bidders a Canadian cable company this ownership restriction shows up as a proposal either at the FCC, the Senate, or the House. Now I know that this provisions is written in broad language and does not specifically say that it is a proposed restriction on Canadian ownership in the United States. However, as I said at the outset of this testimony, CATA represents people who live and deal with reality—not political niceities or evasions. To our knowledge there is only one identifiable group of "foreign" owners competing for cable systems in the United States. The Canadians. Also, while we have not done a study on the subject we have seen no references other than to the Canadian ownership restrictions on "foreign" control of cable systems when the issue of "reciprocity" has been raised. So let's deal with this proposal in realistic terms. It is a proposal to restrict Canadian ownerhsip of cable systems in the United States.

It is highly unlikely that it could be viewed as anything else since so far as we know no American company has recently even attempted to get the Canadian government to change its ownership restrictions—after all, there are no significant areas of Canada that do not already have cable. Hence the purpose of this provision is to restrict competition. The concept of trade reciprocity, while it sounds good, has even been refuted by the Reagan Administration as being inappropriate when applied on a piecemeal basis such as is proposed in S. 2172.

If the real concept behind the foreign ownership restriction in this bill was "fairness" then we would have no problem with the imposition of reciprocity—applied in a truly reciprocal manner. That is, for instance, in the case of the Canadians, we would not impose ownership restrictions on them until they owned approximately the same amount of the American cable industry as Americans did when restrictions were imposed by the Canadians. That is, they would have to own over 85 percent of the industry first! No, "fairness" is not the reason for this proposal. Neither, of course, can security be claimed as the ultimate goal. After all, we know of no Eastern Bloc country that has a sepcific cable television ownership restriction that would trigger this provision! Let's be honest. This is a proposal to restrict competition. As such, CATA is against it. We favor the free and open marketplace. That is the democratic tradition we have grown up with and the one we are trying to preserve. It is not accomplished by governmental intrusion in the marketplace to protect one competitor against another. The Franchising Authorities have all the resources necessary to determine who will be best suited to construct their cable system. The Federal Government has no business intruding in that decision unless there is a federal purpose to be served. None is evident in this case.

MUNICIPAL OWNERSHIP

A serious "federal question" does arise when we get to the issue of municipal ownership of cable television systems. Frankly, the members of CATA are somewhat surprised that you, Mr. Chairman, would support any form of municipal ownership such as is contemplated and allowed in S. 2172. Less than a month ago you appeared on a television interview program and said that one of your concerns was a perceived trend toward nationalism and socialism in this country. We share that concern. Less than a week ago you were on another national television program and you suggested that Senators and Congressmen had to argue and vote for their convictions rather than polictical expediency. We agree with that too. Let us not mince words. Municipal ownership of cable television systems is socialism in its worst form. It is not only the government taking over a non-essential private enterprise, but the media as well. Municipal ownership is contrary to the democractic, private enterprise marketplace concept that we have built this country upon and it threatens to undermine our First Amendment freedoms as well. We cannot understand how you, Mr. Chairman, of all people could propose such a bill. CATA will oppose any legislative attempts to legitimize municipal ownership regardless of the source, and regardless of attempts to restrict or "sanitize" such ownership.

We, of course, recognize that you have attempted to draft safeguards into the municipal ownership provisions. Governmental entities may not literally take over existing systems without paying fair market value for them—but what does that mean? Most franchises specifically disallow any value assessment on the franchise itself, yet to sell a system without the franchise is meaningless. And what about the municipality that decides not to buy the system at all, but to build its own. Here you have the private entrepreneur competing with the government that regulates his business activities! What is worse, the government can use its municipal bonding power and tax exemptions to make competition almost impossible. Your "safeguards" do not go far enough, and we do not think they ever can.

How does one "totally separate" the owner of a system from control over content or programming? Does S. 2172 propose to make cable a quasi-common carrier should it be municipally owned? That may be the only way to truly assure that the government would not affect the program content. Indeed franchising authorities today are constantly trying to affect program content and they don't even own the system! What makes you think that you will have any more success in preventing that control through this legislation? The only way to prevent government control of programming is to prevent government ownership in the first place.

There are already proposals loose in the land that would create communal bodies to decide the program content of cable systems on a community by community basis under guidelines of government authorities. All one needs to do is look at the legislation being urged on the California State Legislature (A.B. 2742) to see how far we have already moved toward a socialistic or communistic approach to the information available to our citizens. That plan includes percentages of the type of programming that will be allowed on California cable systems and local "citizens committees" to decide the content!

There is no half-way approach to government ownership of the media, just as there is no such thing as "free market" socialism. Cable television is not an "essential service". The simple proof of that is that in the open marketplace today only about 50 percent of those who have the option subscribe to cable. That cannot be said to be considered an "essential" service, or a "utility". The government, at any level, be it Federal, State, or local has no business taking over such as enterprise.

The members of the Community Antenna Television Association urge you, Mr. Chairman, to publicly oppose municipal ownership, as you have done in the past. We would ask that you propose an amendment to S. 2172 to ban municpal ownership of cable television systems. With your leadership, along with the other members of this Subcommittee, S. 2172 with the modifications suggested here, we believe, would be adopted into law. We would support such legislation.

Thank you for this opportunity to express the views of the working cable operators across the country.

Senator GOLDWATER. Thank you.

Our next witness will be Ms. Rita Stull.

Ms. STULL. Thank you.

My name is Rita Stull, and I am cable communications officer of the city of Cincinnati. I am here representing the National Association of Telecommunications Officers and Advisors, called NATOA for short. I want to extend greetings from NATOA's president, Mr. Frank Greif, telecommunications officer of the city of Seattle, who would normally testify for our organization in a proceeding such as this, but whose schedule has prevented him from being here.

I am submitting several documents to the committee for inclusion in the record, which I hope will be helpful to you in your deliberations. One of those documents goes over the bill thoroughly item by item.

I want to join other speakers here today in commending you for launching meaningful dialog on the impact of the coming of cable communications. Having said that, I must add that NATOA is deeply concerned about the practical impact of numerous provisions of the bill which we doubt will noticeably advance the public interest.

We believe that the relationship between the Federal Government and local authorities in cable regulation should be a working partnership. In this partnership, the Federal Government should establish minimum requirements and standards where they may be necessary to assert general national policy or to protect the public interest. Local authorities should amplify these requirements as necessary to assure that cable meets local needs.

Regulation should occur at the lowest level that is consistent with the achievement of the necessary results. Since cable is geographically, socially and commercially a local communications system, fostering of responsiveness to local needs should be a high priority.

In this respect we consider the current bill to be fundamentally flawed. Demolition of large areas of local regulatory authority, granting of exclusive jurisdiction in these areas to the Federal Government, and burdening the Federal Communications Commission with large responsibilities for regulating thousands of cable systems in the United States is the wrong path. Only compelling need should be the basis for taking on of large new regulatory programs by the Federal Government in this day and age.

It is with great regret that I must tell this committee that the city of Cincinnati, along with numerous other cities and communities, has experienced great difficulty in regulating cable companies in such a way as to meet local requirements. We find that under present arrangements we barely have the power and the leverage to win even the most basic battles that must be won.

There is a surprising consistency to the problems encountered by NATOA members across the country. Typical of these are some situations which are currently facing Cincinnati. I will name a couple:

One, in Cincinnati we have a complete absence of a viable engineering design, with disastrous consequences ensuing for all planning and scheduling of construction. We have refusal of the company to accede to city inspection of installations. We have refusal of the company to quote rates to alarm dealers and programers for leased access to the system, as required in the franchise. We have high-pressure sales tactics that are fostered by company policies. We have virtual inability of the city to secure informative or meaningful reports from the company on what it has done, is doing, and plans to do to fulfill various provisions of the franchise.

I am citing these typical problems for two reasons: First, relations between major cities and cable companies have deteriorated sharply in the past year or 18 months. As a general background to your work, you are entitled to know why.

Second, a number of provisions of the bill will sharply reduce what little power we have to protect local business communities and local people. Some, such as Federal preemption in the area of records, will result in direct destruction of our existing modest powers. Others, such as restrictions on ratemaking and buyback, will reduce our leverage below viable minimums.

In other words, we have large cable companies who are not responding even when we have 150- and 200-page franchises in place.

I would like to thank you for your time. We commend you for providing us with the opportunity to express our serious cable concerns in the context of a cableonly bill, and we mean that sincerely. I will be pleased to answer any questions that you may have or prepare any documents that you may need to further your investigation.

Thank you very much.

[The statement follows:]

STATEMENT OF RITA STULL, CABLE COMMUNICATIONS OFFICER, CITY OF CINCINNATI

Good morning, Senator Goldwater, and Members of the Committee and Members of the Staff.

My name is Rita Stull, and I am Cable Communications Officer of the City of Cincinnati. I am here representing the National Association of Telecommunications Officers and Advisors, called NATOA for short. I want to extend greetings from NATOA's president, Mr. Frank Greif, Telecommunications Officer of the City of Seattle, who would normally testify for our organization in a proceeding such as this, but whose schedule has prevented him from being here.

I am submitting several documents to the Committee for inclusion in the record, which I hope will be helpful to you in your deliberations.

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We believe that the relationship between the Federal government and local authorities in cable regulation, should be a working partnership. In this partnership, the Federal government should establish minimum requirements and standards where they may be necessary to assert general national policy or to protect the public interest. Local authorities should amplify these requirements as necessary to assure that cable meets local needs. Regulation should occur at the lowest level that is consistent with the achievement of the necessary results. Since cable is geographically, socially, and commercially a local communications system, fostering of responsiveness to local needs should be a high priority.

In this respect, we regard the current Bill as being fundamentally flawed. Demolition of large areas of local regulatory authority, granting of exclusive jurisdiction in these areas to the Federal government, and burdening the Federal Communications Commission with large responsibilities for regulating the thousands of cable systems in the United States, is the wrong path. Only compelling need should be the basis for the taking on of large new regulatory programs by the Federal government in this day and age.

It is with great regret that I must tell the Committee that the City of Cincinnati, along with numerous other cities and communities, has experienced great difficulty in regulating the cable company in such a way as to meet local requirements. We find that under present arrangements, we barely have the power and the leverage to win even the most basic battles that must be won. There is a surprising consistency to the problems encountered by NATOA members across the country. Typical of these are some of the situations which I currently face in Cincinnati.

(1) Complete absence of a viable engineering design, with disastrous consequences ensuing for all planning and scheduling of construction. Today, more than a year after our franchise was awarded, we still do not know where the headend will be located. As far as we can determine, neither does the company.

(2) Refusal of the company to grant access to City inspection of installation. Our own check of 25 installations showed that 15 were defective and dangerous. The franchisee has involved personnel from a number of City agencies in meetings lasting over several months in efforts to delay or avoid City inspection, although citizens' property and lives are at stake.

(3) Refusal of the company to quote rates to alarm dealers and programmers for leased access to the system. After 1 year of exchanging numerous written communications, meetings before City Council, and participating in public hearings, the company finally produced an application form for leased access, which is attached for your reference. You will notice that at no time has the company produced a listing of the actual rates that will be charged for various kinds of leased access.

(4) High pressure sales tactics that are fostered by company policies. We have had to mount a substantial consumer protection program in the cable field to counter sales activities that have been fostered by such company policies as paying salespeople on a commission only basis and paying no commission at all for sale of basic service.

(5) Virtual inability of the City to secure informative or meaningful reports from the company on what it has done, is doing, and plans to do to fulfill various provisions of the franchise.

I am citing these typical problems for two reasons.

First, relations between major cities and cable companies have deteriorated sharply in the past year or eighteen months. As a general background to your work, you are entitled to know why.

Second, a number of provisions of the Bill will sharply reduce what little power we have to protect local business communities and local people. Some, such as Federal preemption is the area of records, will result in direct destruction of our existing modest powers. Others, such as restrictions on ratemaking and buyback, will reduce our leverage below viable minimums.

Thank you for your time. We commend you for providing us with the opportunity to express our serious cable concerns in the context of a cable-only Bill. I will be pleased to answer any questions that you may have.

CITY OF CINCINNATI,
OFFICE OF CABLE COMMUNICATIONS,
Cincinnati, Ohio, May 20, 1982.

Senator BARRY GOLDWATER,
Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR SENATOR GOLDWATER: I am writing to thank you for the opportunity to testify on S. 2172 on behalf of the National Association of Telecommunications Officers and Advisors (NATOA). I am requesting that this letter and its attachment be placed in the record of the hearings as supplementary documents in support of the summary statements that I made in my testimony.

In my testimony I stated that NATOA's detailed comments on S. 2172 would be submitted to you for the record. These comments have been forwarded to the Committee for inclusion in the record, with a covering letter signed by Frank Grief, President of NATOA, under date of May 14, 1982.

With this letter we are enclosing a documented response to comments made on my testimony by Mr. Gustave Hauser, President and Chief Executive Officer of Warner Amex, in his testimony before the Committee on Tuesday, April 27, 1982. I wish to make it emphatically clear that neither NATOA nor the City of Cincinnati has any wish to carry on any kind of vendetta with Mr. Hauser or his company. His comments, however, make it unavoidable that I place into the record of the Hearings, the factual information that supports the statements that I made to the Committee.

Mr. Hauser stated, in general, that my statement that Warner Amex had no system plan for construction of the Cincinnati system, was untrue. He excused the company's failure to live up to the construction schedule to which it has agreed as one of the conditions of the franchise, by saying that construction of the system has barely begun. He said that no problem exists or has existed with regard to access to the system by alarm companies. He indicated that the efforts of the city of Cincinnati constituted evidence for the proposition that the cable industry should be protected from local regulation.

The first three of the points made by Mr. Hauser, are in response to three of the five problems that I cited in my testimony. The fourth of his comments is general. We are therefore providing, in the attachment that accompanies this letter, the documentation on which each of the five points made in my testimony are based. We are satisfied to let you read the enclosed record and form your own opinion as to the merit of our statements.

In the balance of this letter I want to state, briefly, but more adequately than was possible at the hearings, why I think that these and similar matters arising in our city and in other cities, are central to your concerns. It is not our intention to use your hearings as a forum for the airing of controversies that do not pertain to your efforts.

Our city granted a franchise to Warner Amex Cable Communications of Cincinnati in February 1981. Since granting the franchise, we have encountered important problems in three major areas: (1) Substantial and continuous default on its contract obligations on the part of the company; (2) behavior of the company and its representatives which, whether or not in violation of the contract, is detrimental to our residents; and (3) refusal of the company to enter into a dialogue with us of sufficient forthrightness for us to be able to understand their real problems and purposes, on which we could begin to build mutually helpful solutions.

Mr. Hauser strongly implied to your committee that the government of the City of Cincinnati is in the hands of zealots, but the opposite is the case. As our problems mounted, the responsible officials of the city held a number of meetings and discussions. The approach that arose from these discussions, and the approach that we have pursued as a matter of policy, has been firmly guided by caution and by patience. We want our system built. We want to stay with the franchisee that we have chosen, if that should prove to be possible. We want good relations with this company, based on mutual honesty and respect.

It is the considered opinion of every responsible official in this city who is involved in this matter, none of whom entertains any animus against either the cable industry or our franchisee, that our efforts to establish a more open interchange with the company has not brought about a more forthcoming approach on the part of the company.

At this point we would be derelict in our responsibilities if we did not recognize the possibility that our patience is construed as weakness, and our restraint taken by the company as a license to evade or postpone responsibilities with relative safety, while it pursues purposes and agendas that are not vouchsafed to us.

One of those purposes and agendas may be to find tools at the national level that will make it possible for them to avoid various of their contractual responsibilities to us, in whole or in part, temporarily or permanently.

This opens up the additional possibility that, in this effort, the firm is operating in concert with the entire industry, one of whose major purposes may be to evade the responsibilities that they gladly took on to win city franchises and to beat out competitors—particularly competitors who offered less in the sincere belief that the winning bids were financially unrealistic.

Our first indication of the way in which the wind might be blowing came shortly after the signing of our contract with the franchisee. We learned that, while signing our franchise and others like it, the company and the industry were telling the Congress that they had no obligation whatever to fulfill these contracts in the area of access, which constitute a major factor in the financial commitments involved. We read these statements with something approaching incredulity, and we were much sobered. For the relevant text, we refer you to the document "Cable Television, Government Regulation, and the First Amendment," submitted to Senator Packwood by the National Cable Television Association, April 1981, page 48, second paragraph, passim.

The next occurrence was the hiring away from the city by Warner Amex Cable Communications, of our Assistant City Solicitor, who had been principally responsible for every phase of the process that led to the selection of Warner Amex as our franchisee and who was principally responsible for drafting our franchise agreement. This had two results. First, it deprived the city of its principal source of information and legal expertise, for any coming difficulty that might arise between the company and the city and turned our own sword against us. Second, it served as notification to every senior city official that the company had it in its power to confer lifetime rewards on parties whom the conferring of such rewards was deemed to be in the company's interest.

The record of our ensuing problems is attached to this letter.

What we are asking of the Congress at this time, is that it not become a party to a sweeping national renunciation of their obligations to cities and communities throughout the United States, that our franchisee and the cable industry is openly seeking, now that they have the franchises in their hands. I regret to say that S. 2172 would have exactly this impact, as the National Association of Telecommunications Officers and Advisors has extensively documented in its submission.

We urge Congress to take a different tack. We ask you to state that, as a matter of national policy, the promises that were made by cable companies to beat out competitors in franchise competitions should be considered binding upon the winners, and that a basic purpose of regulation will be to establish necessary authority at the most appropriate levels of jurisdiction to assure that the terms of these contracts are honored.

We believe that, as long as our franchisee thinks that Congress will help him to escape his obligations, he will not deal with us on the basis of forthright interchange. We therefore ask you, clearly and unequivocally and once and for all, to close this door. With the door closed, we, and other U.S. cities, can settle down with our franchisees to the real work of turning America into a wired nation.

Sincerely yours,

RITA R. STULL,
Cable Communications Administrator.

Enclosures.

STATEMENT OF RITA STULL, CABLE COMMUNICATIONS OFFICER, CITY OF CINCINNATI

This document provides information relating to each of five problem areas in the regulation of cable in the City of Cincinnati, which were cited by Rita Stull, Cable Communications Officer of the City of Cincinnati, in her testimony before the Senate Subcommittee on Communications, April 27, 1982.

For each cited problem, the text as it appears in her prepared statement is reproduced here, with accompanying documentation.

If the Subcommittee should need further information, the City of Cincinnati will be pleased to give whatever assistance it can. The City's files of correspondence, records of telephone calls, and records of meetings, are entirely open to the Subcommittee and its staff.

"(1) Complete absence of a viable engineering design, with disastrous consequences ensuing for all planning and scheduling of construction. Today, more than a year after our franchise was awarded, we still do not know where the headend will be located. As far as we can determine, neither does the company."

The design of a cable system includes, among other things, locating the sites for the headend or headends, the hubs, access centers, towers, and other facilities; identification of neighborhoods for construction in the initial phases; and sequencing of subsequent construction in accordance with the master plan.

None of these things is occuring as scheduled and as promised in the franchise. The status of some of the matters cited above, is set forth in the chart below.

Item	Proposed start	Actual start	Proposed finish	Actual finish
Strand mapping	Feb. 19, 1982	Oct. 9, 1981	Feb. 18, 1982	Not complete.
Signal survey for headend	Feb. 18, 1981		Apr. 1, 1981	Do.

Item	Proposed start	Actual start	Proposed finish	Actual finish
Headend site acquisition	Mar. 1, 1981		Apr. 18, 1981	Do.
Design	Apr. 19, 1981	Oct. 9, 1981	Feb. 18, 1982	Do.
Tower and headend construction	Aug. 1, 1981		Oct. 18, 1981	Do.
Construction year one	Aug. 19, 1981	Nov. 16, 1981	Feb. 18, 1982	Do.

At this juncture, some fifteen months after the franchise was awarded, at which time the system was to have been well along toward completion, only a few neighborhoods, involving some 1,500 subscribers, have been activated. Since the system has no headend, these several neighborhoods have been activated by means of a feed from the headend of one of the company's suburban systems.

We have had great difficulty in securing from the company any explanation or explanations that account for their breach of contract along such a broad front. Whatever the reasons may be, it is clear that the franchisee did not possess, and does not possess, a viable plan for constructing a cable system in the City of Cincinnati.

A possible explanation may lie in the company's having offered in its system proposal, the capability for discrete transmission within each of 44 neighborhoods in Cincinnati. The franchisee may have subsequently discovered that the creation of a system configuration to achieve this goal, raises numerous problems with regard to the present state of technical knowledge, available equipment, and operating experience.

We do not know why the company, faced with these problems, did not come to us to conduct mutual discussion about design modifications. We speculate that the frank admission of error that might be implicit in such an offer of discussion, was feared by the company because of the possibility that losing bidders in the franchise competition might sue to have the award laid aside and the competition re-opened. The franchisee apparently preferred that any risk or harm resulting from his franchising behavior, should accrue to the City and its residents rather than to himself.

We might add that the same approach has been evident with regard to subscriber rates, which the company offered, specified, and guaranteed in its proposal to the city, and which were subsequently incorporated into the franchise agreement which the firm signed with alacrity. In a recent meeting in the City Manager's office, executives of the firm stated that, since costs were running higher than anticipated, the scale of subscriber fees as specified in the franchise would eventually have to be modified to accommodate these costs. The executives were apparently nonplussed by the response of the Deputy City Manager, that the City of Cincinnati would not agree to such an increase. "Then where can the money come from? one of the executives asked. The City's reply, that management's performance might be underwritten by the firm's shareholders, rather than the residents of the City of Cincinnati, was received with astonishment.

"(2) Refusal of the company to grant access to City inspection of installation. Our own check of 25 installations showed that 15 were defective and dangerous. The franchisee has involved personnel from a number of City agencies in meetings lasting over several months in efforts to delay or avoid City inspection, although citizens' property and lives are at stake."

The franchise requires that the franchisee must comply with various regulations and codes. These include the City of Cincinnati Building Code and the National Electric Safety Code, which require inspection of all cable installations. In addition, the franchise requires the franchisee to submit his proposed policies and procedures relating to installation, to the City's Buildings and Inspections department for review, before installations start.

The company's original submission of policies and procedures for installation was rejected because of noncompliance with local codes. A revised installation procedure was not submitted until after installations were underway. Serious problems immediately arose with regard to inspections to assure compliance with this revised installation plan. The company did not want to pay the cost of inspections required by the codes and we did not believe that this cost should be passed on by the company to its subscribers. So called "spot inspections," in which only a random sample of installations is inspected, were unacceptable to our Inspection Bureau because of the problem of liability.

In an effort to evaluate the potential problems that might arise under any plan that involved inspection of less than the total number of installations, the City assumed the costs for initial inspections to determine the percentage of problem installations. For several days, the company provided the city with a list of homes in which installations had been made. Of thirty five addresses that were received, inspectors gained entry into twenty-five homes. Of the twenty-five installations that were inspected, fifteen were found to be defective and dangerous. The company then refused to supply the city with any more names for inspection, claiming that their company policy for protection of consumer privacy prohibited them from providing us with such information.

As of this date, this problem has still not been resolved.

"(3) Refusal of the company to quote rates to alarm dealers and programmers for leased access to the system. After one year of exchanging numerous written communications, meeting before City Council, and participating in public hearings, the company finally produced an application form for leased access, which is attached for your reference.[1] You will notice that at no time has the company produced a listing of the actual rates that will be charged for various kinds of leased access."

On April 24, 1981, local Cincinnati alarm dealers requested help from the City Council in acquiring access to the cable system. Their actual preference, the companies stated, was for the City Council to prohibit the cable company from operating an alarm business. The alarm dealers stated that the company would not make channels on the system available to them for lease. Current Bell rates for leased lines, the companies stated, were very high, and prevented them from competing effectively with Warner Amex Security Systems, whose line usage was in essence subsidized.

The City Council refused to prohibit Warner Amex from operating a security system, but requested that the Company develop a rate structure that would allow for access to the cable system as required in the franchise.

After a number of complaints and meetings, the company produced an application form for leased access on September 9, 1981.

This long, involved form, a copy of which is attached, seriously violates the privacy of any applicant who goes through the effort of trying to fill it out.

We know of no legitimate reason why the company should need or wish to have much of the information that it requested in this form. Seeking of such information by the company could have two thrusts. It could actively discourage application for leased access. It could also serve as a means whereby the company might develop a rationale for denying access to "undesirable" users. Allegations of "undesirability" could be made with regard to applicants wishing to offer services that are competitive to those being offered by the company on the channels that it controls.

"(4) High pressure sales tactics that are fostered by company policies. We have had to mount a substantial consumer protection program in the cable field to counter sales activities that have been fostered by such company policies as paying salespeople on a commission only basis and paying no commission at all for sale of basic service."

After receiving numerous complaints about cable sales tactics, mostly from citizens and city employees who had some knowledge about what was promised in the cable franchise, the city decided to investigate the company policies regarding sale of cable services.

Problems that we encountered included: Distribution of written information to potential customers quoting prices for services in the county, not the city. County prices were higher. Charging senior citizens for installation when such installation is free according to the franchise requirements. Informing potential customers about the most expensive level of service even when asked what cheapest service cost. Not telling people what all the service levels are. Telling consumers that salespeople would keep coming back until the customer had signed up for service. Urging consumers to buy all the services now and cancel later if they were dissatisfied. Telling people that the $10 installation fee is just a special; that it will cost $40–$50 at a later date, when in actuality the cost of installation is mandated in the ordinance.

The city discovered that the company did not pay any commission at all for the sale of Economy Service. Since the salespersons worked on a 100 percent commission basis, it was understandable that the lowest level of service wasn't even mentioned by salespersons to the City's residents.

The City decided to publish a cable consumer pamphlet to provide our residents with information about cable services. We are pleased to attach a copy of the text.[2]

We have provided the company with a copy of this text. They have complained about the proposed issuance of this publication with great anger, taking their struggle directly to the city Manager's Office. At the same time, since seeing the text of the booklet, the company has begun to pay a modest commission for the sale of basic service.

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[1] Retained in committee files.

[2] Retained in committee files.

"(5) Virtual inability to the city to secure informative or meaningful reports from the company on what it has done, is doing, and plans to do to fulfill various provisions of the franchise."

None of the local executives of our franchisee is empowered to make decisions, or even to provide the most basic information. Everything must be referred to headquarters in New York. In general, very little comes back. Even small matters often involve numerous meetings, fruitless exchange of telephone calls and written communications, and long delays. Establishment of accountability in such a context is nearly impossible, and regulation is averted.

The city's Office of Cable Communications worked for five months with the company to develop a reporting system that would assure compliance with the requirements of the franchise, without proliferating the number of reports that had to be prepared. The biggest obstacle we encountered was reluctance by the company to supply even minimal substantive information. Warmer Amex's reports tend to contain pages of repetitious definitions, copies of old reports, and vague generalities about progress. Figures documenting definite accomplishments are conspicuously absent.

When actual numbers are required and cannot be avoided, they are then stated inaccurately, to put the matter gently. For example, the company states that construction in certain areas of the City is complete, when required underground construction in these areas has not begun.

Senator GOLDWATER. Thank you very much, Ms. Stull. Howard, do you have some questions?

Senator CANNON. Well, my immediate reaction to that would be why do you not do something about terminating your franchise? You say you have given them a franchise and you cannot get cooperation out of them. Would you not have that authority?

Ms. STULL. We do have that authority. However, this is the first year of our franchise and we do not believe it is in the best interests of our citizens to revoke a franchise. We have spent a considerable amount of money getting the franchise in the first place. We do not have any confidence that any other company at this time could do a better job.

So our position is we are trying to work with them but we need to keep all the authority that we have to work out those negotiations. We need the Federal Government to say yes, it is within the jurisdiction of the local authorities to do this, and that is what we would like for you to put in your bill. When we are faced with things like the *Boulder* case, the antitrust action, this kind of crybaby approach by the cable companies of gee, cities are on their backs, we are giving them a hard time. It is making it very difficult for us to enforce. We are almost saying we are going to have to take you to court, daily, if you do not do this and you do not do that.

They finally do comply, but this is a problem that is universal across the country and we need the Federal Government to say that regulation at the local level is appropriate; that is where it belongs. We would like for you to set some Federal minimums; but you cannot say to the local government that we are going to take away any rights that you have to reclaim a system or throw a company out that is not performing: we are going to take away any rights you have to regulate rates.

We do not regulate these pay rates that Mr. Wheeler is talking about. We have no intention of regulating those. All we regulate is the amount the company can charge the people for the right to pay. We have a system of cable structure in this company where you pay for the right to pay. You pay $9.45 to get the top level of service in Cincinnati so that you can have the right to buy pay services. That is all we are regulating: What is that minimum that the company can charge. This bill is affecting access to the system. You are saying that the cable company is not a monopoly. Cable companies are monopolies. If you add all those satellite services, pay services, local television stations and whatever, you have not touched even one-eighth of what the system is going to offer to our cities.

Senator CANNON. Do you think this bill would enhance or hinder the process of negotiations for franchising and refranchising cable systems?

Ms. STULL. I think it would seriously hinder it. I think it would be devastating.

Senator CANNON. Let me ask Mr. Wheeler to respond to what you have had to say.

Mr. WHEELER. Thank you, Senator. Let us look at the four problems that were raised here.

First, the question of engineering design. Cincinnati is the second or third city in America to have the highly advanced Qube system which is literally on the cutting edge of the latest technology and the latest engineering. We admit that it is an earn-while-you-learn kind of a situation. We are out there trying to invent a new technology, and make a new technology work as we go along.

Another question was raised by city inspection. One of the things we are finding across the country, for instance, is that as housing starts go down, the city electrical inspectors are saying well, now we want to inspect each cable connection because we have not got enough to do for the new housing, and it is $10 a pop. So that an additional $10 per subscriber cost is put on because the city electrical inspectors do not have enough to do.

High pressure sales? That is relative, I guess. And the reports is an issue that we have no difficulty giving reports. The question is whether or not these have to be "Mother, may I" kind of reports.

Then I think you raised a very important point, Senator Cannon. That is the question of refranchising. Because look at the position that a cable operator is in when he goes to the city of Cincinnati or any other city to refranchise. We have heard a lot of talk today about the ability to condemn the system or to buy it back at book value. Depreciated book value. That is not the value of the system. That puts the city in a situation where the cable operator goes out, takes all the risk, builds a viable business, and then they come in and say OK, now I am going to buy it at depreciated book value. That is not exactly kosher.

The situation also with regard to rates as would be allowed under this bill. What is the basic service? They say, you want the franchise? Call these new pay services basic services and let us regulate them and we will give you the franchise. You want the franchise? Pay a higher franchise fee.

There was the statement made earlier that there was no evidence as to the abuse of franchise fees. What is happening in the city of New York where they are saying if you want the franchise, you will violate the Federal law and you will figure out a way to pay us 12 percent instead of 5 percent. It is that kind of a hold that the cities have over cable operators in the franchising and refranchising process that we think it is important that you establish Federal guidelines for.

We are not saying avoid regulation; we are saying let us have a standardized set of rules across the country.

Ms. **Stull**. May I respond?

Senator **Cannon**. I do not want to get into an argument of who did what to whom. Let me ask Mr. Wheeler: Is the allocation of a specific number of channels to be dedicated for public access the most efficient way of insuring that the public will receive the maximum benefits from their cable service?

Mr. **Wheeler**. No, sir; I do not think so. I think we ought to be talking in terms of a ceiling on access channels, not a floor on access channels.

I mentioned in my direct testimony that we did a study of an average cable system and found that 20 percent, 22 percent of the consumers' monthly payment went to direct regulatory costs. The two main components of that were the franchise fee and public access.

In this particular franchise, they require 9 access channels of which 3 are being used. In the last week, for instance, we did a tally. Those access channels which are required to sit there were used 3.7 percent of the time, and they are required to sit there, and the cable operator—and more importantly, the cable consumer—pays the cost.

In this system again, the cable operator wanted to provide additional services, but he could not use those 9 channels, even though they were not being used 97 percent of the time. He had to go out and build excess capacity that the consumer ended up paying for. I am not sure that that is the most adequate way of delivering good service.

Now one additional point, quickly. That is, there has been a terrific upswing in the amount of local programing and access we have been providing. In the year after the *Midwest II* decision of the Supreme Court where they struck down the Federal access rules, our local origination increased 80 percent across the country. So we are doing it and we are doing it absent rules. The trouble is the city's requirements are so huge as to require numerous channels to be left blank, and the consumer has to pay for those fallow channels.

Senator **Cannon**. Do you have a suggested alternative in your written text that you submitted?

Mr. **Wheeler**. Yes, sir.

Senator **Cannon**. Ms. Boosalis, let me ask you. Do you believe that the definition of what is the basic cable service, which is the only service under Government regulation, should be left solely to the discretion of the local cable operator, as is the case in this bill?

Ms. **Boosalis**. I do, indeed. I think it should be a matter negotiated between the city and the local operator.

Senator **Cannon**. Thank you, Mr. Chairman.

My next would be to let Ms. Stull—she did not get a chance to respond further.

Senator **Goldwater**. I know you want to answer, so you go right ahead.

Ms. STULL. I only have a couple of things that might be of interest to you. For instance, in the area of inspections, in Cincinnati we finally got the company to agree to give us 39 names of people whose homes were installed. We gained entry into 25 homes. Of those 25 installations in the homes that we got into, 15 had defective installations. We think that is exceedingly high and we think that this needs to be worked out at the local level and it is not something that needs to be worked out at the Federal level.

When you talk about the fact that the companies are just now trying to figure out what it is that they offered to cities in the franchises, I think that that is after the fact.

When we entered into the franchise agreement our understanding was that the company knew what it was doing, and we would assume that if you say you are going to have a design in 6 months, that you will have one. It does not make sense to say "gee, we are thinking about it, and we will come up with one in 3 years."

As far as high pressure sales tactics, if you pay your salesmen 100-percent commission and you pay them basically no commission at all for selling the first level of service, it is highly unlikely that the salesmen are going to even mention to the consumer that there is a lower cost level of service.

So we are in essence telling people who may not be able to get certain kinds of service except on cable, that the only way they are going to get it is at the highest cost. That is high-pressure sales tactics, and Cincinnatians do not like it, and they want it controlled.

Senator CANNON. What kind of a complaint level have you had on that precise issue?

Ms. STULL. We have had a number of complaints. I can provide you with the documents. I do not want to give you numbers right off the top of my head.

Senator CANNON. Can you give us some percentage figure, or something, on it?

Ms. STULL. Well, we had a thousand homes sold——

Senator CANNON. You know, "a number of complaints" could mean, to me, it could be two, and to others it might mean 200.

Ms. STULL. I would say we have 10 percent complaints. One of the problems is the people do not know how to complain. They do not realize; they were not given information. We are having to publish a consumer information booklet that we are going to distribute to tell people just exactly what is supposed to be offered. And I will make that available to you so you can see the kinds of nitty-gritty, day-to-day problems that are going to be affected. And our ability to control those problems is going to be affected by the kind of legislation you have proposed.

As regards some of these things that Mr. Wheeler has told you——

Senator CANNON. I do not want to use all of my time here, but just let me say as a former city attorney, I know what I would recommend to the city commission if we had a franchise with someone and they were not living up to the obligations of their franchise, rather than come to Congress to get relief. Thank you, Mr. Chairman.

Ms. **Stull**. Our solicitor agrees with you, Senator Cannon. We would just rather not establish that sort of permanent relationship with the company.

Senator **Goldwater**. I believe we are beginning to understand why it might take a little while to write this legislation.

Any of you feel free to answer if you have the desire. I asked Mr. Wheeler to leave that last chart available. I would like to ask a question or two about it. Pay cable is on the way up, is that not right?

Mr. **Wheeler**. Yes, sir.

Senator **Goldwater**. Video recorders are going up more rapidly than any of them. And in spite of court decision, I have extreme doubt that any question will rest on whether or not you can use video recorders. But I do not think the availability of TV, whether it be air or cable or satellite, has much to do with that, do you?

Mr. **Wheeler**. On the use of video recorders?

Senator **Goldwater**. Yes.

Mr. **Wheeler**. We find what people are using video recorders for is a time shift; to tape something off of over-the-air TV, or tape it off of cable, and watch it at some time when it is more convenient.

Senator **Goldwater**. I have a question here that I hate like the devil to ask, but I have to preface all my remarks by saying that I have cable television in my own home and I am building a satellite receiver—which I have been doing for a long time. This interests me. With my cable, I think I have two stations that flash on and off with red, green, and so forth. I asked the fellow, what is all that for? He said, well, that is for X-rated movies; that will cost you an extra $5 a month. Well, I am never home at the right time and I do not have the $5.

Do you think that the X-rated movie aspect of cable TV has much to do with that increase?

Mr. **Wheeler**. The only studies that I have seen have shown that there is a significant relationship between that and the sale of video cassettes. Something like a huge percentage of the video cassettes that people use in their homes are also for X-rated. I think the X-rated cable issue is a very overstated issue.

There is a lot of R programing, but the X programing, as far as we can quantify right now, there are roughly half a dozen systems in the country that offer it. But I think the significant thing that you mentioned, Senator, is that if you do not want to see it, you do not have to see it. In your system first, you have to pay additional amount; you have to send that extra $5 a month in and say I want to see that programing.

The other thing is, there is a lock device on most systems so that even after you pay that, if you do not want the kids watching it when you are away from home, you can lock it out in some kind of a way. I think that is a responsible kind of approach.

I think when we keep in mind the kind of things Chairman Fowler was saying this morning about the first amendment rights of cable operators, the question is not do you limit it, but the question is cable operators must be responsible in the way they exercise their first amendment rights, and I think those two steps are a responsible way of doing it.

Senator **Goldwater**. Do any of the others of you have any comments on that? Because we have gotten quite a bit of this in the way of casual comment before the subcommittee. It is interesting to know what you people think about it. Mr. Effros?

Mr. **Effros**. Senator, I would echo Tom's remarks but make it a little stronger. That is, to go back and say that the Government has no business getting into any area of regulation where it cannot show an absolute need. In this particular area, there are safeguards in the consumer marketplace. Again, you have to buy it; you have to unlock it; you have to do all sorts of things and that is your choice as a consumer. It is also the choice that the first amendment is supposed to continue to leave to the consumer.

I do not know, to bring it back to one of my favorite subjects for this morning, I do not know how a municipally owned system would deal with the issue. I do not know how a municipally owned system would deal with marketing itself. I do not know how a municipally owned system would do at inspecting its own installations. And I do not know that they would write a 300- or a 200-page franchise to deal with the issue, but that is for someone else to respond to.

Senator **Goldwater**. Having served on a city council, I can agree with you. Does anybody else want to comment on that?

Ms. **Boosalis**. I would only comment that in general, I do not believe—I would have to challenge Mr. Wheeler that the kinds of situations that he is referring to as being excessive overregulation by local government is the norm. There might be exceptions, and I think we always recognize those kind of things.

I would have to challenge Mr. Effros' statement that any kind of government regulation at all, particularly over the use of public streets in our cities, is socialism.

Mr. **Effros**. I said "ownership" of the system.

Ms. **Boosalis**. Ownership of it would be socialism. I think in my conservative State of Nebraska we would be shocked at that view, since we are a State that has totally publicly owned power.

Ms. **Stull**. I would like to remind the Senators again that cable is a monopoly in our cities; that this competition we are talking about is practically nonexistent today, not to mention not available to most people. Who can afford to pay $5,000 for a satellite dish on their roof? Only 8 out of 4,000 geographic areas have more than one cable company competing for the same set of subscribers.

And that cable companies in cities like Cincinnati offer 150 or more channels of which very few are available for access. We anticipate our local businesses will not be able to have access to the system because none of the policies have been in place for that.

If local business wants to use cable for data transmission—and we have done a study in Cincinnati that indicates that we could save anywhere from 30 to 50 percent of current local Bell rates that are charged for data transmission by using cable—why should we deprive local business of that opportunity? Why should we benefit one company, one owner of one cable company, by letting them have total access to 150 channels and give them the option to close out anybody else?

If somebody like Home Box Office wanted to lease a channel and offer it to Cincinnatians at a lower rate, they will not be able to do that in Cincinnati today. We think those are the concerns that are serious issues.

Senator CANNON. Why could they not do that in Cincinnati?

Ms. STULL. Because our cable company at this particular time has not even established what its rates are, and it is known amongst all of us who deal with the cable industry that there is absolutely no way that they are going to let Home Box Office have access to a channel at a reasonable rate.

Senator CANNON. Well, now, is not every——

Ms. STULL. We are supposed to determine that the industry has set reasonable rates. We still have not received the rate structure in Cincinnati that our Cincinnati City Council has been asking for for 1 year.

So what I am trying to point out to you is that the relationships between the companies and cities have deteriorated, and I am even going so far as to imply that this bill has been manipulated by the industry because our interests are not represented. And we would really appreciate the opportunity to explain to you just exactly item by item in the bill what the real impact at the local level is and where we need help from you. We really do need help.

Senator CANNON. Does not every one of your utilities enjoy a monopoly?

Ms. STULL. Yes, they do.

Senator CANNON. What do you do when they do not comply with their service requirements?

Ms. STULL. Well, in Ohio they are regulated by the Ohio Public Utilities Commission, so it is not a city problem.

Senator CANNON. Yes, but when they do not satisfy the needs of your constituents in your city, what do you do?

Ms. STULL. Right now, we have hearings and——

Senator CANNON. Get an order to show cause and take them before the Public Service Commission and do something about it?

Ms. STULL. That is right.

Senator CANNON. Have you tried to do that in this instance?

Ms. STULL. Yes. We are doing that now. We have only had a franchise for 1 year.

Mr. EFFROS. May I point out something?

Senator GOLDWATER. I would point out that under this bill it is required that 10 percent be public and 10 percent for lease; and under this bill you have the power for basic rates, so you do not need to worry about it.

Ms. STULL. No, we do not.

Senator GOLDWATER. Now, Mr. Wheeler—yes; you do.

Ms. STULL. No; we do not. It says the company determines basic service.

Senator GOLDWATER. Well, I am not going to argue with you legally, but you do have.

Senator CANNON. Basic service.

Ms. STULL. Well, the company determines what it is, though.

Senator GOLDWATER. What?

Ms. STULL. The company gets to set what basic service is. So if the company comes to us and says OK, we have decided basic service is zero; the city has to say I guess basic service is not going to cost anything.

Senator **Goldwater**. Well, if you have a city council, they set that up.

Ms. **Stull**. No. This bill preempts that.

Senator **Goldwater**. Well, we could argue that all day, but if it is not right, we will change it, because that is what we intended to do.

Ms. **Stull**. We think it preempts it. Maybe we are wrong.

Senator **Goldwater**. Mr. Wheeler, S. 2172 does not specifically discuss regulation of installation rates or regulation of rates for enhanced services such as data transmission.

Who if anyone should regulate those rates?

Mr. **Wheeler**. That is a good question. I think on the installation rates question I think that is a marketplace function, that as a matter of fact, I think we ought to be allowed to run 2-week promotions where you get a free installation to develop business rather than having to go to the city council and have a 6-month proceeding there to determine whether or not we can have their permission.

Ms. **Stull**. You do not have to do that.

Mr. **Wheeler**. In many cities across the country we have to go to the city council and ask permission to do events such as that.

On the question of enhanced services, that is probably the $64 question because we do not know what those enhanced services are going to be right now. We are experimenting with a lot of ideas. One of the things that is scaring us off—it was mentioned in Cincinnati how local businesses are not being able to lease channels. One of the things that is scaring us off from leasing channels is the threat that it may trigger some kind of common carrier status. So one of the important things about this bill is to set the ground rules as to what happens when you do offer these kinds of enhanced services. Does it immediately trigger rate of return regulation for the whole system or for a part of the system or whatever?

So we are going very carefully into some of these new things, and frankly holding back from going into them because we do not know what the regulatory impacts are going to be. As it stands now, the regulatory impact in Cincinnati could be different from the regulatory impact in Omaha. That is something that we have to be very careful about.

Ms. **Stull**. Is the implication of that that the cable industry's rights are greater than the rights of industry to have access to something that in essence in our cities is a common carrier? Is that what you are saying? That your rights are greater than those of every other business in cities?

Mr. **Wheeler**. Cable is not a common carrier, so we have to begin with that.

Ms. **Stull**. But in essence it is, though, whether you call it that or not is irrelevant. It functions as a common carrier.

Mr. **Wheeler**. No; it does not.

Ms. **Stull**. And you use one arm of your business to subsidize the other arm of your business. We all know that.

Mr. **Wheeler**. No, we do not all know that.

Senator **Goldwater**. May I suggest we are a little bit pushed for time? You can debate out in the hall.

Mr. Effros, traditionally the cable industry has been made up of hundreds of small cable systems. Many large companies, however, now have substantial ownership interests in the cable industry. Should Congress weigh such diverse interests when trying to develop ownership policies that foster cable growth?

Mr. EFFROS. I think Congress should always consider it, as long as Congress is not jumping to a conclusion for the need for regulation. I go back to the same point I made before. I do not think there is any evidence in the cable industry, even though it is certainly true that the smaller operators have been bought out by the larger operators, there is no indication that the larger operators are anywhere near monopoly status with respect to the other competitive forces that we are faced with in the cable industry.

We are hearing a lot about competition or lack of same, and common carrier status, and it is all revolving around the big cities, it is revolving around 200-page franchises and problems of that nature, and a stake that has public power.

None of that is relevant to most of the cable industry today. Most of the cable industry today, a majority of it has 5,000 or less subscribers per system. A majority of the cable systems today are 12 channels or less. A majority of the cable systems today offer their services to people only 50 percent of whom take the service. It is not like the public power company. There is no issue in public power of marketing the power. There is certainly an issue, as we heard, about marketing cable. These are different industries in terms of size.

Yes, representing the small operators, we always have a concern about the fact that the large operators are coming in and buying up the systems, but I do not think that looking at the industry as a whole, and particularly looking at cable as a part of the telecommunications structure, that there is any concern for Congress to look into it at this point.

Senator GOLDWATER. I am glad you make that point. Too many people look at cable as only being used by large cities.

Now, out where Senator Cannon and I live, where we have many, many high mountains and deep canyons, cable is the only way that we can get television facilities into communities, say, of 50 to 250 people. I hope that during our hearings we can bear that in mind. We hear that a great city like Cincinnati only has one or two cable systems. We have 10 in my community, and they fight like cats and dogs. There is all kinds of competition.

I do not want to lose sight of the fact that the innovators of cable are the out-of-towners, the people who live out in what we call the boondocks.

Mr. EFFROS. Senator, you mentioned that you were about to put in an Earth terminal. The facts that Tom was pointing out before for Dallas, that the large city systems are facing competition, something that the city regulators do not seem to acknowledge yet, is also true in the small communities. We are talking, Mr. Fowler's organization is talking right now about direct broadcast satellite. Direct broadast satellite is not likely to work very well in the big cities with buildings in the way, but it is certainly going to work very well out in the small communities. It is going to present a significant competitive force. The same is true of low-power television.

So we are not only a majority of the industry today, the smaller operators in the nonurban areas; we are also facing competition, and if the marketplace can be allowed to operate absent regulation by the Federal, the State, or the local governments, I suspect we would see a communications system develop. If we get too much regulation, particularly in the large cities, I suspect we will not see cable in some of those large cities.

Mr. **Wheeler**. Mr. Chairman, could I pick up on that for just 1 minute?

Senator **Goldwater**. I have another source of opposition to satellite reception, my wife.

I now have two 85-foot masts in my yard which I facetiously gave her for Christmas one year, and the next year I got a white mink coat.

She was raising all kinds of hell about that big dish.

Mr. **Wheeler**. Have you ever thought about painting them green?

To follow up on one of the things Steve was saying, he was talking about how small communities are also affected by this competition. I was in Ocala, Fla., recently, which is a community of 70,000 people. It is not tiny but it is not huge. They have three different people down there, companies, who are going from point to point to the different multiple housing units and building satellite-fed MATV systems to compete with the cable system. And if it is existing in Ocala, Fla., then you know it is existing everywhere including in your backyard.

Senator **Goldwater**. We want to thank you folks for appearing before us. Anytime you feel during these hearings that you would like something to add as the hearings develop, we are not in any big rush to get a bill out. We just want to make sure it is a good one, because as you can see, we do not know a hell of a lot about it.

[The following information was subsequently received for the record:]

Warner Amex Cable Communications
of Cincinnati, Inc.,
Cincinnati, Ohio, June 10, 1982.

Hon. Barry Goldwater,
Committee on Commerce, Science, and Transportation,
U.S. Senate, Russell Senate Office Building, Washington, D.C.

Dear Senator Goldwater: I am writing to correct the Senate record insofar as it reflects the comments and views of Mrs. Rita R. Stull, Cable Communications Administrator, City of Cincinnati. In particular, I am responding to the numerous incorrect assertions contained in Mrs. Stull's Senate testimony of Arpil 26, 1982 as well as her recent letter to you dated May 20, 1982. (Mrs. Stull's testimony was officially given on behalf of the National Association of Telecommunications Officers and Advisors (NATOA) although her oral comments and her letter of May 20th appear to be presented in her capacity as a Cincinnati cable administrator).

At the outset, I wish to underscore that the belligerent and accusatory tone of Mrs. Stull's statements is completely unwarranted. Moreover, it is 100 percent at odds with recent public statements which she made regarding Warner Amex's Cincinnati performance. As recently as the May 16–18, 1982 Municipal Administration of Cable Television Confernce in Madison, Wisconsin, Mrs. Stull stated publicly that the City of Cincinnati and Warner Amex had established "a good working relationship", that Warner Amex was "responsive to the City's needs" and that Warner Amex was "exemplary" in its activities to date. These statements are on record.

The following is a point by point rebuttal of the inaccurate statements in Mrs. Stull's April 26, 1982 testimony:

Fact I: Warner Amex has Presented its Engineering and Construction Design to the City of Cincinnati in Complete Detail

The design and construction items referred to by Mrs. Stull are, in fact, complete and have been presented to the City. Warner Amex is currently constructing such cities as Dallas, Houston, Greater Cincinnati, Pittsburgh, St. Louis and Chicago, and has enormous experience in the design of cable systems—indeed this is for us a routine function. The engineering design for the Cincinnati system was explained to Mrs. Stull and other city officials in *two* full presentations by Warner Amex officials. The first such presentation was held on February 4. 1982; the second, which was open to the public and held in City Council chambers, was on May 3, 1982.

Fact II: The Inspection Program Proposed by Mrs. Stull—I.E., That a City Inspector Accompany Cable Installers on Each Home Installation—Makes No Technical or Economic Sense

We have on several occasions pointed out to Mrs. Stull that there is no safety or economic rational for 100 percent inspection and that neither the franchise nor the National Electric Code supports her position on this subject. Moreover, we have advised the City that we are not aware of any other city in the country which requires that each home installation be inspected, at a significant additional charge. In an effort to be cooperative, we have participated in several meetings with city officials to reach agreement as to a workable procedure with will satisfy the City's goals and not unduly burden or subscribers or threaten the economic viability of the business.

Fact III: Warner Amex has Not Only Negotiated With Alarm Companies, But We Have Also Concluded Three Commercial Access Agreements In Cincinnati

We have undertaken negotiations with the Cincinnati business community for the commercial use of the system. We have met with alarm companies and, in the case of American Alarm, we submitted a formal written proposal in February, 1982. In several other cases, we have already concluded written access agreements. (Incindentally, in the case of American Alarm, we have received no response whatsoever to our February proposal, although we were told a response would be forthcoming prior to March 15, 1982.)

Fact IV: Our Sales Approach Consists of Providing Full Information to the Customer

Consumer sales policy has been fully described to Mrs. Stull and city officials. The policy is simple: it is to provide full disclosure of all levels of service and attendant costs.

Fact V: Warner Amex has Provided the City With Complete Facts and Figures Regarding Every Phase of Our Cincinnati Operation

We estimate that several *hundred* meetings have been held (and a similar number of reports submitted) during the last 15 months. On these occasions, we have met with Mrs. Stull and her superiors (including the Deputy City Manager), members of the Cable Board, the City Council, and other City staff officials to inform the City of virtually every aspect of designing and building the Cincinnati cable system. A written bi-weekly report has been furnished to the City for the last 11 months. The format of the report which Mrs. Stull complains about is the format which was required by the Deputy City Manager.

Several other comments by Mrs. Stull contained in her May 20, 1982 letter are troublesome because of the uncalled-for hostility they reflect. For example:

i. No one has suggested that Mrs. Stull is engaged in a "vendetta", to use her phraseology (page 1);

ii. We do not believe, as Mrs. Stull suggests, that "every responsible official in this city" [Cincinnati] shares Mrs. Stull's views (page 2);

iii. Warner Amex's right to present its views on issues to this Congress does not, in fairness, give rise to Mrs. Stull's conclusion that "the firm is operating in concert with the entire industry" to evade its Cincinnati commitments (page 3);

iv. Our hiring of a respected former City employee resulted in well-wishes from most City officials. It did not, as Mrs. Stull states, "serve as notification to every senior city official that the company had in its power to confer lifetime rewards on parties whom the conferring of such rewards was deemed to be in the company's interest" (page 3).

In sum, we are distressed by the inaccuracies which Mrs. Stull has employed in reporting Warner Amex's progress in constructing the Cincinnati cable system and fulfilling its commitments to create an exciting and comprehensive new cable communications network. especially disturbing is her apparent desire to discredit the

Company before the Senate while *simultaneously* going to great lengths to praise the Company in other public forums.

Very truly yours,

ROBERT MONTGOMERY, *President.*

Senator GOLDWATER. OK, we will have the next panel: Mr. Malcolm Gilchrist, Mr. Paul Bortz, Mr. Thomas Reifenheiser, and Mr. Robert Schmidt. That is on the second panel, so you all take your places.

All right, gentlemen, welcome to the hearings.

We will start with Mr. Malcolm Gilchrist.

STATEMENTS OF MALCOLM IAN GRANT GILCHRIST, VICE PRESIDENT, WARBERG PARIBAS BECKER—A. G. BECKER, INC.; PAUL I. BORTZ, MANAGING PARTNER, BROWNE, BORTZ & CODDINGTON; THOMAS REIFENHEISER, VICE PRESIDENT, CHASE MANHATTAN BANK; AND ROBERT L. SCHMIDT, PRESIDENT, COMMUNICATIONS TECHNOLOGY MANAGEMENT, INC.

Mr. GILCHRIST. Mr. Chairman, with your permission, I would like to submit my full statement and exhibits[1] for the record, and I will briefly summarize that statement for you now.

Senator GOLDWATER. It will be done. Thank you.

Mr. GILCHRIST. I appear here today at the committee's request to address the financial outlook for the cable television industry, and to comment specifically on the capital requirements of the industry and the sources of capital for cable television.

Since its inception in the early 1950's, the industry has experienced a compounded annual growth in basic subscribers of approximately 28 percent. Although the industry's physical growth is impressive, the more important area of interest is cable television's changing role as a service industry. What is now for the most part a distributor of a variety of entertainment, is fast becoming a very complex telecommunications service industry capable of providing many types of services wherein entertainment will remain an important but proportionately decreasing element.

The cable industry is in the middle of a rapid and highly visible period of growth. The resulting capital requirements are substantial and are growing at an ever-increasing rate. Capital expenditures in the industry for 1981 approximated $1.5 billion, and the annual rate of capital expenditures has increased over 600 percent in the last 4 years. This trend will continue for the foreseeable future.

In addition to the construction of new franchises, there is increasing need and demand for cable operators to upgrade or replace their older cable plants in order to keep pace with technological improvements in the changing marketplace. These two factors combine to place an enormous capital burden on the industry.

Today, the largest source of capital for cable telecommunications are loans from commercial banks which we estimate will total $3.44 billion by December 1982. The banking community remains supportive of the industry's efforts. However, the current prolonged period of high interest rates is once again hampering the bottom line performance of this highly capital-intensive industry. As demands increase on cable operators to construct or rebuild cable systems according to tight construction schedules, some reservations are rightfully being raised by bankers as to the industry's ability to meet its growth requirements and at the same time adequately service its debt.

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[1] The exhibits have been retained in the committee files.

The insurance industry remains a major factor in the overall capital picture. We estimate that loans outstanding to the industry from this capital source will total $1.13 billion by December 1982.

It must be noted, however, that the insurance industry itself is undergoing major difficulties and changes in its growth and development. What was once a dependable source of hundreds of millions of dollars in long-term, fixed-rate loans, has now all but disappeared. This situation is not likely to change in the near future.

Since mid-1981, deteriorations in the public stock markets have severely curtailed industry efforts to raise capital in the public debt and equity markets.

On the positive side, other sources of funds seem likely to help meet the capital needs of cable telecommunications. The industry continues to generate strong internal cash flows. Major corporations outside the communications industry, or which have traditionally been involved in other aspects of communications, have recently made large direct investments in cable telecommunications. Limited partnership offerings have become an increasingly popular method of raising equity capital. Industrial revenue bond issues are yet another means by which some operators are addressing the situation.

In summary, cable telecommunications has great potential to service all sectors of society in a great variety of ways. To do this adequately, the industry will need support from every source of capital I have previously mentioned. It will also need fair and equitable treatment from all levels of government. In return, cable telecommunications, as a service industry, must continue to show a high degree of responsibility toward the general public.

I appreciate the opportunity of appearing before the subcommittee, and I will be happy to answer any questions you might have.

[The statement follows:]

STATEMENT OF M. IAN G. GILCHRIST, VICE PRESIDENT, WARBURG PARIBAS BECKER—A. G. BECKER INC.

My name is Ian Gilchrist. I am a Vice President of Warburg Paribas Becker—A. G. Becker, a major international financial institution engaged primarily in the origination and distribution of financial instruments that meet the needs of corporations, governments, institutions and individuals. The Company also manages and evaluates assets for itself and others. During the past decade, Becker has provided a full range of investment banking services to the cable television industry including debt, equity and other forms of financing. Through its venture capital affiliate, Becker Communications Associates, the Company has provided start-up capital, intermediate-term funds and financial consulting to smaller growth companies in the industry since 1973. Becker has developed and maintains a data base on the cable television industry which serves as a source of comparative information for the industry and its sources of capital. Since 1976, the Company has published an annual financial performance and lenders survey of the cable television industry which is widely distributed. A copy of the most recent report, entitled "Five-Year Performance Survey of the Cable Industry" is attached as Exhibit 1 to my statement for the record.

My particular responsibilities at Becker involve debt and equity financing in the public and private capital markets for the larger multiple system cable television operators; the merger, acquisition or sale of cable television properties; and system appraisals and related consulting activities.

I appear here today at the Committee's request to address the financial outlook for the cable television industry, and to comment specifically on the capital requirements of the industry and the sources of capital for cable television.

BACKGROUND OF THE INDUSTRY

Cable television, originally known as "community antenna television" or "CATV", was so-named because signals supplied by system operators were transmitted directly to subscriber television sets via a network of cables similar to that used by the telephone industry. The industry was conceived in the early 1950's as a means of providing quality television reception to small rural communities, where local topography, distance and the earth's curvature blocked adequate signal reception.

The cable television industry has grown substantially since its inception. According to industry sources, on January 1, 1952, there were 70 operating systems serving 14,000 subscribers; in 1960 there were 640 systems serving 650,000 subscribers; and in 1970 there were 2,490 systems serving 4.5 million subscribers. By December 1982, our research department estimates that the cable television industry will be capable of serving approximately 80.5 million households, and will have an estimated 25.0 million subscribers taking basic service. This represents a compounded annual growth in basic subscribers of approximately 28% per annum over the past 30 years. In addition, it is estimated that by December 1982, the industry will have 18.2 million subscribers utilizing the pay-TV services offered, none of which existed in December 1973.

CABLE TELEVISION'S CHANGING ROLE AS A SERVICE INDUSTRY

The industry's physical growth in terms of number of systems, miles of plant and number of subscribers is impressive. However, the more important area of interest is cable television's changing role as a service industry. Where in the past, improved reception of local off-air broadcast signals was the major advantage cable television offered to a market composed predominately of small rural communities, the industy now serves all types of communities—rural, suburban and urban—and provides many other benefits through greater channel capacities, improved and more extensive programming and two-way interactive technology. The industry presently offers a basic service which includes signals from national television networks, independent and educational networks, FM radio stations and local origination facilities. In addition, other programming now available through the use of satellite transmission includes pay television services such as HBO and Showtime, "superstations" such a s WTBS in Atlanta, national sporting events, and government, children's, religious, news, cultural and public affairs programming.

NONVIDEO SERVICES

Two-way interactive technology, still in the developmental stages, has created opportunities for home security systems, efficient monitoring and control of home energy use, data bank and information retrieval services, polling, home based shopping and banking activities, and electronic games. Although two-way interactive services will probably not be a functional part of most cable systems until the late 1980's or early 1990's, nevertheless, it remains clear that cable television's unique technological ability to provide two-way interactive services that can transmit pictures over a large number of channels should secure and maintain a market for this industry in the future. What is now, for the most part, a distributor of a variety of entertainment is fast becoming a very complex telecommunications service industry capable of providing many types of private and public, consumer and commercial related services, wherein entertainment will remain an important but proportionally decreasing element. As such, a more appropriate name for this industry is "cable telecommunications".

CAPITAL REQUIREMENTS OF THE INDUSTRY

The cable telecommunications industry is in the middle of a rapid and highly visible period of growth, both in terms of physical assets and the number and kinds of services rendered. The resulting capital requirements are substantial and are growing at an ever increasing rate, as demands by local franchising authorities and consumers for more and better services increase. Our records show that up until the end of 1978, the industry had expended approximately $3.3 billion to provide cable plant, with an average capability ranging from 12 to 20 channels, to almost one-fifth of the country's television homes. In 1978, the annual rate of capital expenditures was slightly under $250 million. By comparison, captial expenditures in the industry for 1981 approximated $1.5 billion, or an increase in the annual rate of capital expenditures of over 600 percent in 4 years. This trend will continue for the foreseeable future.

Most of the industry's current and future growth will be in the construction of two-way interactive systems in suburban and metropolitan areas with capacities ranging from 36 to 105 channels, at a cost of $600–$800 or more per subscriber. In comparison, three or four years ago, when most of the construction was taking place in more traditional markets, the cost of wiring a community generally ranged between $250–$300 per subscriber. In addition to the construction of new franchise, there is increasing need and demand for system owners to upgrade or replace their older cable plants in order to keep pace with technological imporvement and the changing market place. These two factors combine to place an enormous capital burden on the industry.

CAPITAL SOURCES FOR THE INDUSTRY

Where has the captial come from to satisfy the industry's healthy appetite to date, and where will the capital come from to meet cable telecommunication's increasing needs?

EARLY SOURCES OF CAPITAL

From the time of cable's inception in the early 1950's through the mid-1960's, the sources of capital needed to establish and develop the industry came primarily from:

(1) the private sector, as entrepreneurs or small companies invested their own capital in start-up operations;

(2) venture capitalists, who recognized quickly the viability of cable television;

(3) equipment manufacturers, who provided vendor financing in order to establish their own presence in the industry;

(4) a very small number of financial institutions who typically lent to cable operators based on other assests or sources of income; and

(5) internally generated cash flow which the cable industry itself developed.

During the late 1960's and early 1970's, as the industry became better known and established a track record, more sources of capital became available. A small but knowledgeable group of major money-center banks became active short-term lenders to the industry, as did a few major insurance companies who, as long-term lenders, made the effort to understand this relatively unknown segment of the communications industry. A specialized group of intermediate-term lenders, most of them finance companies, had also emerged by this time—among them our affiliate, Becker Communications Associates. No matter which type of lender was involved, loans at cable television during this period were typically structured on a fully secured basis and at rates several hundred basis point above the institutions' respective base lending rates.

The public stock markets also become a source of capital for the industry during this period, as a moderate number of cable television operators took their companies public. This activity peaked in 1972 with 8 public offerings, the proceeds from which totaled approximately $114 million.

In the early to mid-1970's, when interest rates rose suddenly to record levels and remained there for an extended period, the cable television industry found itself in a difficult situation. Because it was unable to obtain timely rate increases, and because of the abnormally high debt service requirements, the situation overall was a losing proposition regardless of how efficient construction and daily operations were conducted. This resulted in a severe decline in earnings for several years and caused both the public stock markets and majority of short-term lenders to temporarily lessen or withdraw their support for the industry.

The viability of cable television continued to be demonstrated from within despite outside capital constraints, as the industry's internally generated cash flows exhibited strong growth at a time where general economic conditions hampered the growth of many of the more established industries. The financial community as a whole took note of this performance and by 1977, again began to increase its support for cable television, both in terms of the number of institutions willing to actively lend to cable and in the total dollar amount they were making available for loans to the industry. Exhibit 2 details the history of capital being made available to cable television since 1975 from banks, insurance companies, intermediate-term lenders and the public stock markets. In addition to the fact that more dollars were being directed toward cable television, the interest rates and terms under which these dollars could be secured through loans or through the sale of debt or equity in the public stock markets improved dramatically, as recognition of the industry's strong performance.

CURRENT SOURCES OF CAPITAL

Today the largest source of capital for cable telecommunications are loans from commercial banks, which we estimate will total $3.44 billion by December 1982. The banking community remains supportive of the industry's efforts. However, the current prolonged period of record high interest rates is once again hampering the bottom-line performance of this highly capital intensive industry. As demands increase on cable operators to construct or rebuild cable systems according to tight construction schedules imposed on them by local franchising authorities, some reservations are rightfully being raised by bankers as to the industry's ability to meet its growth requirements and, at the same time, adequately service its debt.

The insurance industry remains a major factor in the overall capital picture. We estimate that loans outstanding to the industry from this capital source will total $1.13 billion by December 1982. It must be noted, however, that the insurance industry itself is undergoing major difficulties and changes in its growth and development. What was once a dependable source of hundreds of millions of dollars in long-term fixed rate loans, has now all but disappeared. The traditional industry practice of rolling over short-term bank loans, incured as bridge financing for constuction, is no longer certain. Insurance company lenders have comparatively little money to lend, the availability of such funds is sporatic and unpredictable, and current record high interest rates often makes borrowing on a long-term basis uneconomical. Recent discussions we have had with insurance company lenders who have been and wish to remain active in cable telecommunications, indicate that this situation is not likely to change in the near future.

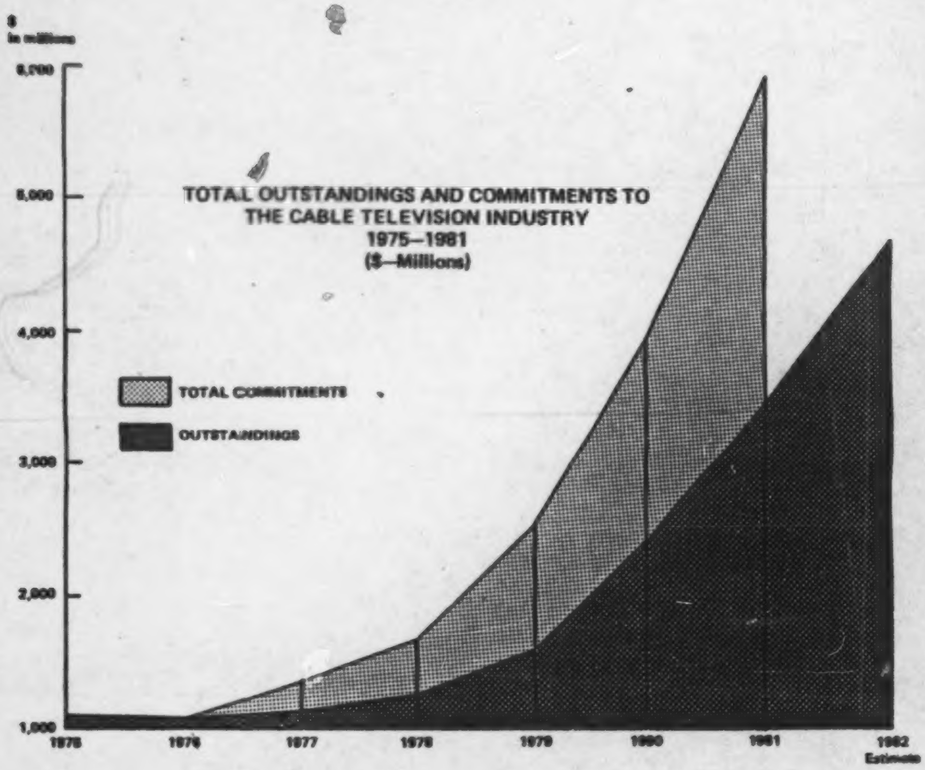
The public markets for debt and equity were an important source of capital for cable telecommunications from 1979 through the early part of 1981. Since mid-1981, however, deteriorations in the public stock markets have severely curtailed industry efforts to raise capital in this manner. While cable stocks, as a whole, have weathered the market better than the stocks of companies in many other larger and better capitalized industries, their values nevertheless have declined. This fact, combined with the distinct possiblity of lower earnings per share resulting from high interest rates and the operational inefficiencies always inherent during a period of substantial physical growth, might continue to defer efforts to raise capital in the public debt and equity markets.

On the positive side, other sources of funds seem likely to help meet the capital needs of cable telecommunications. The industry continues to generate strong internal cash flows. Major corporations outside the communications industry (e.g., American Express Company) or which have traditionally been involved in other aspects of communications (e.g., Knight-Ridder Newspapers, Inc.), have recently made large direct investments in cable telecommunications through joint ventures with established cable operators. Other corporations ae acquiring cable television companies outright (e.g., the proposed acquisition of Liberty Communications, Inc. by Field Enterprises, Inc.). Limited partnership offerings have become an increasingly popular method of raisng equity capital. Industrial revenue bond issues are yet another means by which some cable operators are addressing the situation.

SUMMARY

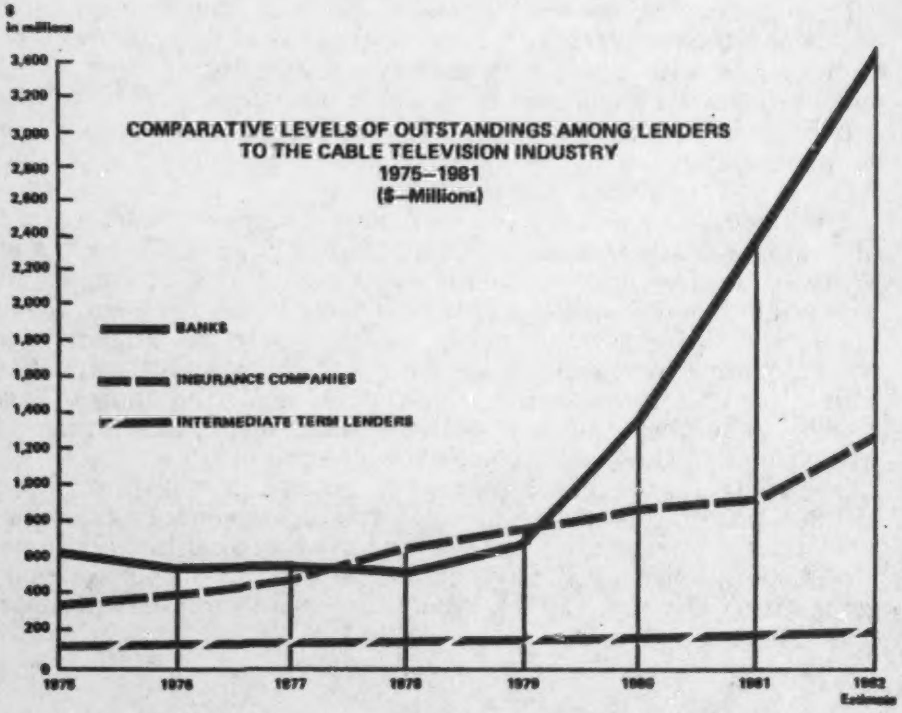
In summary, cable telecommunications has great potential to service all sectors of society—government, business, education and the consumer—in a great variety of ways. To do this adequately, the industry will need support from every source of capital I have previously mentioned. It also will need fair and equitable treatment from government at all levels—federal, state and municipal. In return, cable telecommunications, as a service industry, must continue to show a high degree of responsibility towards the general public.

I appreciate the opportunity of appearing before this Subcommittee to present our views on cable telecommunications. I will be happy to respond to your questions.



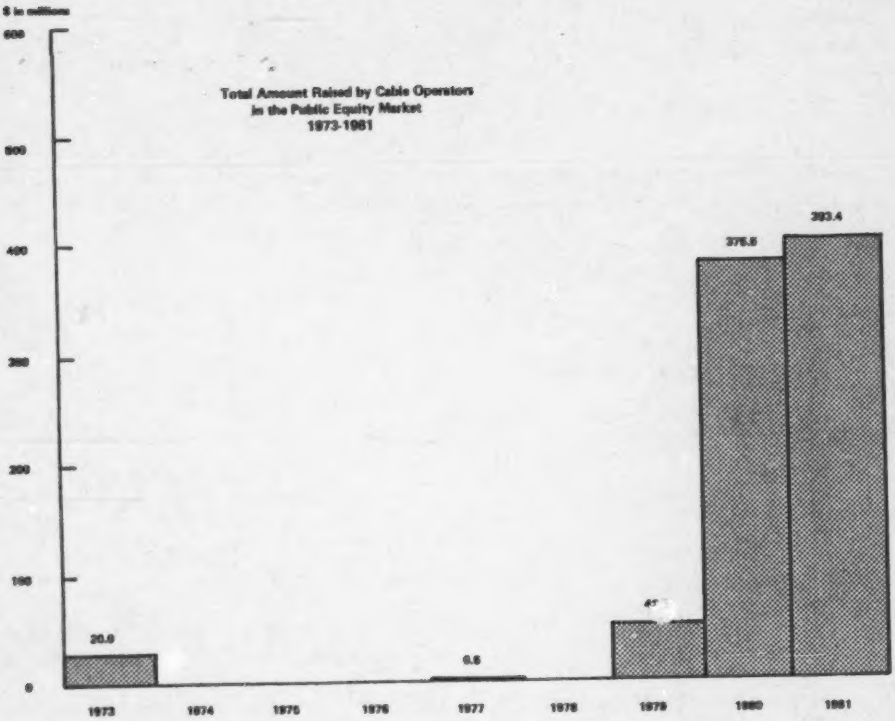
TOTAL OUTSTANDINGS AND COMMITMENTS TO THE CABLE TELEVISION INDUSTRY
1975–1981
($–Millions)

Source: Warburg Paribas Becker Incorporated based on annual surveys of lending institutions.



COMPARATIVE LEVELS OF OUTSTANDINGS AMONG LENDERS TO THE CABLE TELEVISION INDUSTRY
1975–1981
($–Millions)

Source: Warburg Paribas Becker Incorporated based on annual surveys of lending institutions.



Source: Warburg Paribas Becker Incorporated based on annual surveys of lending institutions.

Senator GOLDWATER. Mr. Bortz?

Mr. BORTZ. Thank you, Mr. Chairman.

I am managing partner, Browne, Bortz & Coddington, an economic consulting firm. We have analyzed the viability of competing technologies with respect to cable for a variety of clients in the cable broadcasting and common carrier industries.

I will submit a full statement for the record, and I would like to summarize here.

Senator GOLDWATER. That will be done.

Mr. BORTZ. I would like to specifically comment on leased access and rate regulation, sections 606 and 607 of S. 2172. There is a wide array of delivery modes, current and potential that can compete with cable television. Some of them have already been summarized here—STV, MDS, satellite master antenna systems. The mere presence of competing technologies does not assure viable competition. There are many economic, legislative, and regulatory factors which, when they interact with the technology, determines what will survive in the marketplace over a period of time.

The relaxation of leased access provisions as provided for in your bill depends on the availability of, I quote, "reasonably available alternatives." The question then is under what conditions will viable alternatives exist, and can your bill be used to encourage market competition and to make less likely the need to impose burdensome leased access regulation.

For the National Cable Television Association, our firm studied a particular community, Los Angeles. We looked at two cities within the Los Angeles area. One had cable television before STV was available, and the other had a cable television system put in after STV. STV did very well in the area in which it was able to get in first. In the area in which cable was already in place it did very poorly. Specifically, in areas which had cable before STV, STV only managed 3-percent penetration, not enough to be viable. Where STV was established before cable was built, STV had 14-percent penetration, more than enough to be viable.

I want to emphasize that this is one study, in one city, Los Angeles. The city has aggressive STV operators, with the largest operator marketing, a unique sports package. The question before this subcommittee is viability of cable competition over time, in all markets.

I present data in my prepared statement from a number of sources. Some of these data were prepared by our firm for Microband, a common carrier in the MDS area. The data indicates there is demand for more than one channel of pay television. But the added demand declines with each additional channel provided. Subscribers want more than one premium channel, but by the time you get to 4 or 5 channels in pay television, subscriber interest in additional channels has declined quite a bit.

When we look at what it takes to have viable competition, it is not enough to say let us have a lot of different single channel ways to go. What will be viable on the marketplace is the chief concern. In my opinion we want to have delivery systems competing with cable that have at least four or five channels to deliver. Competing delivery modes do not need 10 or 20 channels because very few consumers are really interested in that. They are certainly not interested in the 80 or 100 channels that are being mandated by the cities.

It is important that you consider in the this legislation mandating the FCC to foster the development of alternative multichannel pay television delivery systems. Right now the FCC is considering in MDS dockets 112 and 113 whether it should expand the number of MDS channels. If commission authorizes two or three 5-channel MDS systems in a market we will have competition to cable. If it takes a narrow naive view of the market authorizing 10 single-channel MDS operators under the claim that such a course will foster competition among MDS operators. I can assure you that MDS will be no competition to cable. The Commission should be encouraged to group those channels together.

Subscription television is another area of potential competition. Dallas has three STV channels. They are not doing very well. They are competing against each other and competing against cable satellite master antenna and MDS as well. I think that those STV operators should be encouraged to have joint operation and marketing—joint operation and marketing in a given market—free of fears of antitrust action.

This leads to my final point regarding rate regulation. I think it is true whether we are looking at the arcane field of common carrier regulation or the antics that we all know surround the scaling, collection, and division of cable compulsory license fees, it is really productive only for attorneys and consultants such as myself. A number of one- or two-channel competitors will not be viable in terms of long-term competition to cable. Avoid rate regulation by mandating multichannel competition to cable.

I suggest and urge, therefore, that S. 2172 could go a long way toward encouraging real competition and avoiding burdensome regulation by mandating the FCC to foster the development of multichannel alternatives to cable television. That would allow you to withhold from imposing regulations such as leased access and rate regulation, which will be unncessarily burdensome.

Thank you.

[The statement follows:]

STATEMENT OF PAUL I. BORTZ, MANAGING PARTNER, BROWNE, BORTZ & CODDINGTON

Mr. Chairman I appreciate this opportunity to appear before the Subcommittee on Communications to testify on the Cable Telecommunications Act of 1982.

I am Paul I. Bortz, Managing Partner of Browne, Bortz & Coddington (BBC). With clients in the cable, broadcasting, common carrier and related new technologies areas, we have analyzed the economic and market factors affecting the development of competing television distribution modes from several different perspectives. I would like to personally comment today on two parts of S. 2172—Section 606 concerned with leased access and Section 607 on rate regulation.

BACKGROUND

The 1980's will see the rapid growth of competing video suppliers. In addition to basic and pay cable, consumers will have access to subcription television (STV), multipoint distribution service (MDS), direct broadcast satellites (DBS), satellite master antenna television (SMATV), video cassettes and discs and low power subscription television. The success of any individual distribution mode is not just a function of technology—which determines what can be—but also of market, economic and regulatory factors—which together determine what will be.

Subscription television.—As of year-end 1981, more than 1.5 million households subscribed to 24 STV systems in 18 markets. STV has grown relatively rapidly in recent years, primarily in uncabled areas. STV is generally not price or service competitive with cable or price competitive with MDS. Financial breakeven levels are also high, probably confining profitable operation to the top 20 or 30 TV markets nationally.

BBC estimates 3.0 to 4.0 million STV subscribers are possible nationally by 1985. Much will depend upon STV's ability to differentiate its service from pay cable and to develop multichannel capability, either directly or through joint marketing efforts among STV operators in a particular market.

Multipoint distribution service (MDS).—The current MDS subscriber base exceeds 500,000 households nationally. MDS can be a good small business featuring low breakeven levels that allow profitable operation in relatively small markets. Because of low breakeven level, MDS is price competitive with cable and can operate with fees in the $12-$15 per month range.

Microband Corporation of America recently filed with the FCC for permission to develop a five channel MDS system know as "Urbanet." This "over-the-air cable system," which may include two way capability through the use of the existing telephone network, could greatly enhance the attractiveness of MDS to consumers.

Direct broadcast satellites.—The FCC appears ready to approve one or more direct broadcast satellite services. DBS has a range of potential uses, including conventional television, high definition television or operation as a "fixed satellite service" providing programming to theatres, cable systems of SMATV operators.

DBS faces several significant obstacles despite its seemingly large potential. DBS subscriber marketing and servicing will of necessity be on a regional or national rather than local basis. As such, operational costs of such a service could be very high. There are important alternative uses for spectrum assigned to DBS, and, at present, FCC interim planning has not adequately dealt with key spectrum allocation issues.

Satellite master antenna television.—SMATV can rapidly penetrate financially attractive apartment complexes and other household concentrations and become established before cable television is provided. Unlike cable and most other video technologies, SMATV is subject to no regulatory authority.

Current SMATV success has come despite the fact it is a fragmented industry, vulnerable to programming cutoffs by major suppliers such as Showtime or The Movie Channel. This situation is changing with several nationally based firms now poised to offer fixed satellite services specifically aimed at the SMATV market. Oak Industries and United Satellite Television have both announced their intention to enter this market. Comsat, through its Satellite Television Corporation subsidiary, plans to begin feeding the SMATV market, reportedly as a precurser to its DBS operation. A unified programming and marketing effort provided through nationally based operators should greatly enhance the already strong competitive position of SMATV.

SECTION 606

The obligation to provide leased access under paragraph (2) of Section 606(a) is to ". . . cease upon determination by the Commission that there are reasonably available alternatives in the relevant area or market." The questions are what determines "reasonably available alternatives," do they now exist, and under what conditions can viable competition to cable be sustained? The following paragraphs address these issues.

Impact of existing technologies on cable subscribership.—For NCTA, BBC estimated the potential impact of existing single channel technologies upon cable industry subscriber levels through survey research in the Los Angeles area, a market with two entrenched STV operators. Residents of two cable franchise areas were surveyed, one served by a mature cable system operational prior to the launch of STV, the second served by a new build system. This survey structure was utilized so as to quantify the advantage STV will gain by being the first premium television service in many major urban markets (e.g., Chicago, Detroit, Washington, D.C.).

Survey results indicate single channel STV can sustain, at least for the time being, a high level of subscribership in an area it penetrates prior to cable TV service becoming available; conversely, however, STV appears to have a difficult time attracting subscribers where cable is simultaneously available at the time of STV launch. It should be noted that the survey was conducted in a strong STV market where one of the STV's has an attractive, exclusive sports package. STV's without such exclusive product might not do as well. In the case study example, only three percent of homes passed in the mature system had STV only compared with an estimated 14 percent in the new build case:

	Mature system		New build	
	Number	Percent	Number	Percent
Cable only subscribers	79	38.0	67	28.3
STV only subscribers	6	2.9	33	13.9
Both cable and STV subscribers	10	4.8	8	3.4
Nonsubscribers	113	53.3	129	54.4
Total	208	100.0	237	100.0

In addition, almost five percent of mature system households and more than three percent of new build system households subscribed to both STV and cable. Although too much should not be inferred from comparing just two systems, it is interesting to note that the percentage of households not subscribing to any service (54 percent) was identical in the two systems; STV growth appears to be directly at the expense of cable penetration.

Long term competitive viability.—I question the long term viability of single channel competition to cable. And, our survey results indicate that single channel systems cannot effectively compete where cable enters first. Exclusive product, such as Los Angeles' ON-TV sports package can be helpful to the single channel operator, but to what degree will subscribers remain with a single channel over time and, if cable is already in an area, what is required to successfully introduce an alternative programming service?

In work done for Microband, an MDS licensee, and submitted by them to the FCC as part of their Urbanet proposal, BBC looked at how many channels an alternative programming service must have to be competitive. No empirical data are available to provide reliable subscriber penetration estimates for multichannel services in competition with cable. However, a variety of theoretical and empirical data on consumer demand suggest that a relatively few premium and non-premium channels can satisfy much of the expressed demand for non-broadcast services. For example:

Arthur D. Little's demand study for Comsat General Corporation submitted to the FCC with Comsat's DBS application shows demand increases with the number of DBS channels, price held constant. However, the increase in penetration declines with the number of channels, indicating that each additional channel adds less and less to the packages' appeal (figure 1).

Cable franchise applications demonstrate a high level of consumer demand for the first premium service, steadily decreasing demand for the second, third and subsequent services. This is supported by several survey research studies (figure 2).

Data from existing systems confirm the decrease in demand for subsequent premium TV services after the first in both typical and new build cable systems (Figure 3).

Nielsen viewership data indicate that veiwing of premium cable channels is comparatively high, viewership of other cable program services relatively low (Figure 4).

Taken together, these data imply that a large portion of consumer demand for non-broadcast program services can probably be met by a four or five channel service, suggesting multichannel STV, MDS, SMATV of DBS can capture enough of a market share to be viable competitors (Figure 5). BBC survey results in Los Angeles bear out this contention. Almost 20 percent of existing cable subscribers said they would consider switching from cable to a three channel STV service, priced "less than twice" the present single channel level. About 40 percent of non-subscribers to either cable or STV would be more likely to subscribe to such a multichannel service, even at the higher price, than they presently are to single channel STV.

In BBC's judgment, cable television will remain the major technology for distributing video programming, even if multichannel STV, MDS, SMATV and DBS develop as planned. The high channel capacity of state-of-the-art cable systems is an advantage over four to five channel competitors, even if the incremental consumer demand attached to these channels is small. However, because these competitors to cable have much lower fixed costs, they can be viable with a small market share, and can bring about the self-regulating effects of marketplace competition.

FACTORS FOR THE COMMISSION TO CONSIDER—SECTION 606(b)(2)

The analyses just presented suggest that, as part of this legislation, the Commission be directed to encourage the development of alternative *multi-channel* pay television delivery systems. The number of providers of service (a criterion in the current bill) is not nearly as important as whether those providers have a multi-channel package. Specifically:

A decision in dockets 81-112, 113 concerning MDS which provided for two or three 4 or 5 channel MDS operators per market would create viable competition; a decision providing for 10 individual MDS licensees would not—and, yet, I fear that a naive view of the marketplace (e.g., let many MDS operators compete against each other) could come out of the process, because the Commission to date has not shown an ability to integrate policy making across distribution modes.

STV lessees in a market should be allowed to jointly market their services and an individual corporation should be allowed to lease more than one station in a market, free of fear of antitrust action. Three STV stations, jointly operated or marketed, will provide more competition to cable, than three STV's each competing against each other and each competing with only a single channel to sell against cable. Similar encouragement of multi-channel operation should be given to low power television.

SMATV should be allowed to develop unfettered by unnecessary regulation at all levels.

LEASED ACCESS AND RATE REGULATION

Any attempt to prescribe leased access and rate regulation is based on an assumption that cable television will have a controlling, dominant position in the pay marketplace.

Rate regulation, whether reflected in the arcane world of common carrier rates or in the antics surrounding the collection and division of cable compulsory license fees, is productive only for attorneys and consulting firms such as ours. The complications of leased access, necessary if there are no alternatives, can be avoided if viable alternatives are made available.

S. 2172 can go a long way towards encouraging real competition and avoiding burdensome regulation if it mandates the Commission to encourage the development of multi-channel alternatives to cable television.

FIGURE 1.—ADL STUDY

[Demand as percent of total TV HH's]

	Price per month			
	$12	$16	$20	$24
Number of DBS channels:				
2	21.5	15	10	8
3	28.0	20	15	11
4	33.0	24	18	14

Note.—These percentages assume no competition.

Source: Arthur D. Little, Inc., "Pay Television Services Via Direct Broadcast Satellite: Demand and Impact in the 1980's," prepared for Comsat General Corp., May 1980, p. 4-35.

FIGURE 2.—SURVEY ANALYSES

	Percentage of premium subscribers purchasing multiple services		
	Scottsdale applications	Denver applications	Gallup survey
1	100	100	100
2	83	58	52
3	22	26	27
4		10	10
5 or more			4

Source: Franchise proposals for Scottsdale, Arizona and Denver, Colorado; and "Gallup Study Shows Strong Interest in Pay TV," the Pay TV Newsletter, Oct. 19, 1981, p. 3.

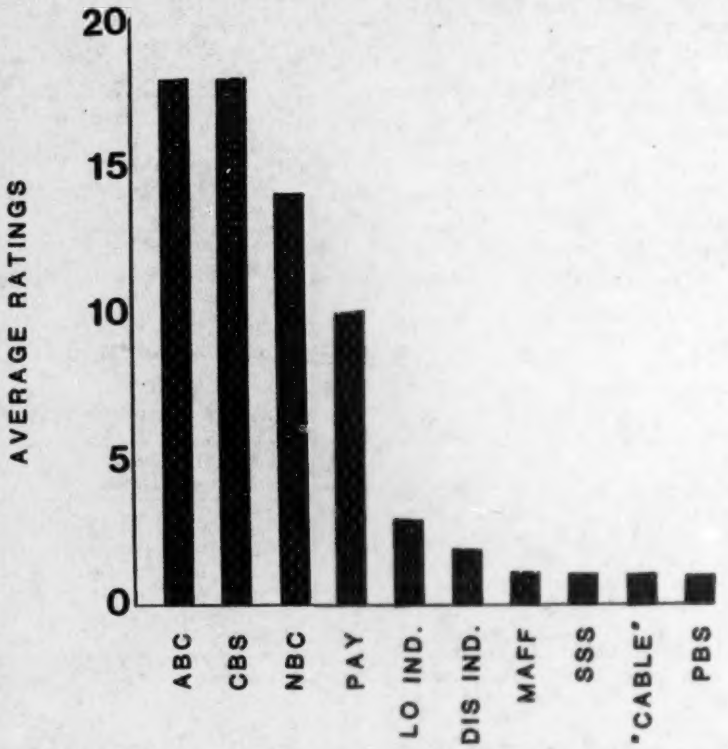
FIGURE 3.—DEMAND OF PREMIUM SUBSCRIBERS FOR MULTIPLE SERVICES

	Percent of premium subscribers	
	New build	Typical
Number of tiers taken:		
1	100	100
2	78	45
3	50	22
4	17	9
5	11	

Source: BBC reformulation of data presented in CableVision, Sept. 7, 1981. p. 28.

FIGURE 4.

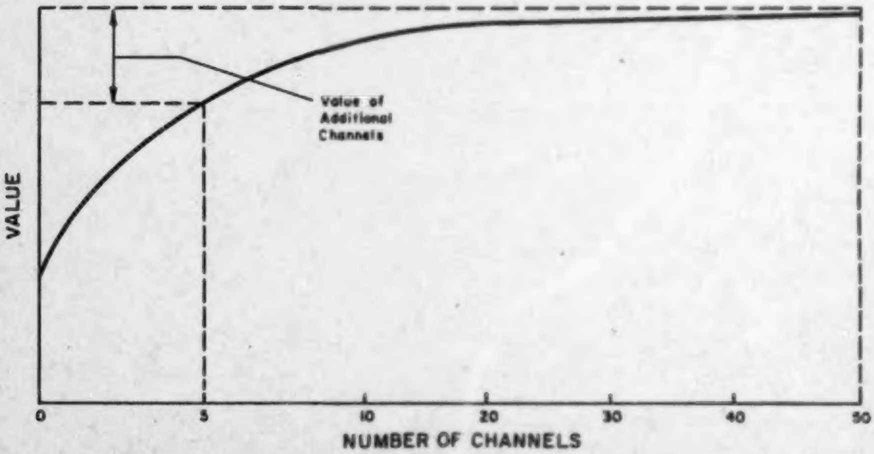
VIEWING IN PAY CABLE HOMES (FEB.1981)



Source: A.C. Nielsen Company, Pay Cable Report, 1981.

FIGURE 5.

DECLINING MARGINAL DEMAND WITH INCREASING PREMIUM CHANNELS



Source: Proposal of Microband Corporation of America for the Creation of Urban-Over-the-Air "Wireless Cable" Networks, to the Federal Communications Commission, General Dockets 80-112 and 80-113, Volume I, p.59.

Senator **Goldwater**. Thank you very much.

Mr. Reifenheiser?

Mr. **Reifenheiser**. Thank you, Mr. Chairman.

For almost 5 years I have headed a group at the Chase Manhattan Bank which specializes in lending to the media and communications industries including cable television throughout the United States. For the past 2 years, Chase has been the leading lender among financial institutions to the cable industry. Our portfolio has grown very significantly during this 5-year time period and now exceeds $300 million.

Being a banker, I will restrict my comments to the implications for financing cable television systems of the Telecommunications Act of 1982. I believe this act serves to clarify some issues that have concerned us over the years. However, it does raise other questions which require additional clarification.

We have under consideration the financing of the construction of a number of sophisticated major urban and surburban franchises with capacities of 50 to 200 channels. Because of particular circumstances in the franchises, some of these will be financed on a stand alone basis. Additionally, the upgrades of many existing systems are now being planned or under construction. Significant differences exist between the systems we have financed in the past and many of the newer systems being franchised from the standpoint of the sophistication of the system, high channel capacity, high and uncertain cost of construction, high cost to provide community service, prominence of multiple dwelling units and their access to competitive technologies, significance of piracy in multiple dwelling units, higher levels of franchise fees, need for much higher levels of penetration for both basic and pay services, need for higher levels of revenue and operating profit per subscriber to be able to repay debt and achieve an economic return to the investor, different demographics in the markets served.

The absence of proven performance in this new environment has made financing more difficult and we are more cautious in approaching such situations.

The industry has always been entrepreneurial in nature. It remains so today in a greater degree than ever before. The much higher levels of service that have been promised at much higher cost in newer systems and upgrades means that the operator must use all of his marketing and managerial skills to achieve the higher levels of penetration and revenue necessary to succeed economically.

Until now, much of the industry's growth has been financed by borrowings with relatively little equity contributed compared to other businesses. This was achieved because of the demonstrated stability of subscriber levels and cash flows. With compressed construction schedules and the presence of the greater risks previously mentioned, as well as higher interest rates, it has become more difficult to finance cable construction with debt. Higher levels of equity are needed since proven levels of performance finance a small percentage of cost.

Without clarification, some of the provisions in the proposed bill may add very considerably to these difficulties. The problems I have with the bill are the concept of leased channels, the potential use that these channels may have, as well as with the definition of rate.

In the innovative environment that new and rebuilt cable systems are in, it does not seem appropriate that the ability to fully utilize that channel capacity should be limited. Large sums are being spent and significant obligations have already been made regarding channel usage. The unrestricted ability to fully exploit the remaining channels is necesary to justify the investments being made.

Further, no mention is made of the potential use to be made of lease channels or on what basis. From my reading of the bill, I can foresee the first applicant for a leased channel providing a proven product such as an entertainment or sports package which would be in direct competition with the system operator's own offering. Conceivably, this could be done on a stand-alone basis without regarding for the tiering concept that is commonly in use today. If this were the case, no cable system would be financible.

Finally, although rates for leased channels are not to be regulated, they are to be on a first come, first served, nondiscriminatory basis. I presume nondiscriminatory means the same price applies to everyone but what happens if the rate is high and no one leases? Will nondiscrimination be based on inputed rates paid by such services as HBO, Showtime, CableNews Network and ESPN?

As an aside, current rules prohibit regulation of pay programing. It would be helpful if this were made a matter of law in any legislation.

It has been estimated that $5 billion will be spent in the next 5 years on new cable construction and rebuilds. At the same time, new ground is being broken in terms of community service and commercial products. All of this must be financed. Funds will have to be raised based on the perceived economic viability of these systems, with a large part of it provided in the form of debt, either dirctly or indirectly.

In the difficult financial environment we are in with limited availability of equity and debt, this is not the time to inhibit entrepreneurs with a leased channel concept that poses severe threats. The industry must work hard to beat the commitments it has made. Success is not a sure thing. Let us not interrupt the rapid progress that is taking place by making it more difficult to achieve economic returns, thereby reducing the ability to raise the large sums that are required.

Thank you.

Senator **Goldwater**. Thank you very much.

Mr. Schmidt?

Mr. **Schmidt**. Thank you, Mr. Chairman. My name is Robert Schmidt. I am president of Communications Technology Management. I would like to submit my statement for the record and, if you permit, I will give you some insights and highlights.

Senator **Goldwater**. That will be done. That is fine.

Mr. **Schmidt**. From the outset, Mr. Chairman, I would like to establish the fact that I am here today as a businessman, as an entrepreneur. I think that has some relativity to what you are trying to accomplish in this bill.

Prior to forming CTM in the fall of 1979, I was the president of the National Cable Television Association for over 4 years. Today, in our business, we do very little with cable television. In fact, for the last 2 years the cable industry has wondered what CTM does in its various business pursuits.

Frankly, what we are doing is trying to develop the business of nonentertainment communication bared services. I need to tell you a little bit about what our company is today to give you an insight as to how we are wrestling with some of those problems. I will leave this material for the committee to look at and will furnish additional copies for the other members as well.

Senator GOLDWATER. Thank you.

Mr. SCHMIDT. Today we are in four different businesses. CTM operate's a common carrier microwave company in the Washington-Baltimore marketplace. In conjunction with a satellite uplinking facility soon to be in 20 other markets. That satellite facility looks at every domestic satellite. The three dishes have are steerable antennas which give us the opportunity to transmit and receive programing from different transponders and satellites.

In addition, we build integrated communications systems for commercial buildings, delivering voice, data, and video. We compete with A.T. & T. for those opportunities. We are doing that in the Washington D.C., Los Angeles, and Corpus Christi and Austin, Tex.

In addition, we have a strategic merketing and consulting business. In the consulting business we represent, professional sports teams, magazine and newspaper publishers. CTM represents broadcasters and a variety of other people who are looking at new technologies and trying to determine how they can develop viable businesses utilizing those technologies.

We are members of the NCTA and UISTA.

So I can tell you as a business person I am looking at cross technologies. I will tell you as an opening comment I do not believe that that cable is a monopoly. In fact, I doubt that cable will be a monopoly if the present Commission's plans are allowed to run their course.

The reason is the distribution systems that are being contemplated will allow competition in the marketplace. The bottom line of the scenario is that today, the business of cable television is one of entertainment. The average consumer does not know how that product is delivered to them, nor should they. Service providers try to find a viable way, preferably one that has some economic benefit to them, to get programing to the marketplace whatever available transmission system.

The fact is, as Mr. Wheeler just stated you have cable without cable, cable with satellite, and all this other business because the consumer does not care. And we should not expect them to.

Now I would like to focus my remarks on cable's relationships to other distribution systems in the delivery of information services. What we are trying to do is to develop a system for delivering these services.

I will give you some insights as to the cable industry's R. & D. costs. My estimations, indicate that approximately $60 million has been spent by the cable television industry to develop nonentertainment services. Those services are still coming. They are not in the marketplace in any significant manner.

They will not be in the marketplace for a few years to come. The reason is we are dealing with a cultural problem. We are asking the consumer to become a technologist. That is not going to happen overnight.

We are going to have to develop what I call idiot-proof systems. To see an example of one, watch the cashier, the next time you go into McDonald's. They punch buttons that have names on them. The machine does everything. It computes change. It reduces the opportunity for error.

That kind of terminal will be the kind of terminal we will see eventually in our homes. But that is not going to happen overnight. That is not going to happen without a tremendous amount of risk. I am happy I am sitting next to a banker today because 18 months ago when I started the satellite service in this city called Metrosat, and the Microwave Service, Metronet, I could not get a banker to lend me money. They thought I had a pipe dream. They did not think I had a business.

Today, that business serves the major commercial networks and the National Chamber of Commerce. I am delivering the signal for this hearing today, via C-span. We have already exceeded our third year's projections.

That is a business. But I did that in a free marketplace. I did not do it because of a lot of regulation. That opportunity should be made available to others.

In addition, I think that your approach in the leased-access area is a good attempt, but I feel it falls short of the target. I think it will serve to retard the development new services.

The reason I say that because I represent those people who are program users and program developers who want access to that system. I cannot identify one single instance of abuse that has taken place where a programer has not been able to strike some sort of a business relationship with a business system, be it cable, MDS, or what have you.

We are all in the business to try to find a profit. I think when the day occurs that you have abuse, then the mechanisms ought to be in place to deal with that abuse. But, if you move too quickly to establish percentages, I do not think those percentages will have a direct correlation to the marketplace. I do not think that they are enough. I do not think they are too much. I think it is really not established yet.

The fact is that there will be a marketplace in these areas, giving an opportunity for entrepreneurs. And I am not holding myself up as an example. I have not made a profit yet. I am building a business. We have grown very rapidly over the past 3 years. The cable industry is starting to understand some of the things I want to do. We are creating regional interconnects, because cable, as you should know, is not a switch network. It has a major technology deficiency. You are not going to see these services come in overnight until other risk-takers move in and help the cable operators develop them. The reason is that the cable operator has an established business today. He is not going to take those risks.

As a person interested in developing those services, I have to have an opportunity to get to the marketplace unfettered, without regulation. I do not need a 10-percent mandated lease access. I can go make my business opportunities with different distribution systems.

Thank you very much.

[The statement follows:]

STATEMENT OF ROBERT L. SCHMIDT, PRESIDENT, COMMUNICATIONS TECHNOLOGY MANAGEMENT, INC.

Thank you for providing me with the opportunity to address the Senate Communications Subcommittee today on cable television's role in the overall telecommunications industry. Due to my position as President of Communications Technology Management, Inc. I am focusing my remarks on cable's relationship to other distribution systems in the delivery of information services.

For the benefit of those of you who are unfamiliar with my company, CTM is a diversified telecommunications systems and services company. Our focus is on cost-effective delivery of electronic and video services to the home and commercial markets. In line with our objectives, CTM provides strategic consulting services to companies involved in the video and electronic information industries; design and systems engineering for advanced telecommunications systems; operations of regional transmission networks; and implementation of new information service ventures.

I formed CTM in 1979, after serving for four years as President of the National Cable Television Association. My goal was to serve as a catalyst for the cable industry to develop and deliver information services. I saw then, as I do now, the need for cable to offer a full range of entertainment, information and other ancillary services to maintain a competitive posture in the telecommunications marketplace.

It is extremely important, particularly with regard to the enactment of new legislation, that the relationship between cable television and othe segments of the telecommunications industry be fully understood. As you know, cable is garnering considerable media and public scrutiny at this time. Why is cable receiving this kind of attention and what is the basis for the excitement surrounding the industry?

First of all, cable TV brings extensive video offerings which would otherwise not be available, and has been extremely successful at doing so. As a result there is strong grass roots support for expansion of cable service. Similarly, the exciting new entertainment services that cable can provide increases the attractiveness of the medium. Obviously, the franchising process and attendant publicity increase visibility for the industry. And the potential for reaching new audiences by advertisers, merchandisers, and other kinds of information providers makes cable one of the most talked-about new technologies since the inception of the television itself.

I feel that cable's potential to deliver a wide variety of non-video services is where the real excitement lies. Cable has the ultimate capability to provide consumers and businesses with diverse entertainment, information, and transactional services. In many cases, this capability, if effectively exploited, will dramatically effect the present way of life of many Americans. In fact, cable's potential role as a provider of data exchange services among businesses represents a whole additional side of the cable growth issue that is almost impossible to quantify at this point.

Where exactly is cable in relationship to the rest of the telecommunications industry? While its potential is very real, its coverage today is less than total. Cable now serves roughly one-quarter of all American television households. Furthermore, the number of subscribers to systems with the immediate capability of bringing in non-video services is very small. While these statistics are expected to change dramatically, cable is still viewed largely as a deliverer of entertainment programs rather than a high capacity transmission mechanism. In addition, the potential for service to business users is almost completely unrealized at present.

Cable is not alone in attempting to meet these evolving markets. Telephone and private data networks, satellite and microwave systems are all being developed by private interests to serve new and diverse markets. As a competitor to these systems, cable may be characterized as having a greater range of capabilities than most, but subject to more hurdles before market entry can be achieved, particularly with regard to levels of financing and franchising requirements.

Ideally, cable will develop in concert with other kinds of systems in order to both meet and stimulate demand for new services. For this scenario to take place it is important for cable to be viewed realistically and fairly from a legislative and regulatory perspective. At CTM, our concern is that the information services industry develop in a cost-effective and efficient manner that will enable benefits to be realized by both the consumer and business markets. Cable will play a critical role in this progression, and the industry has a need to have this role recognized.

The information services industry is still very much in an evolutionary stage. This is due in part because effective delivery of information services is a complex issue. It is a systems engineering problem, which requires the blending of computer hardware, data processing software and communications system architecture into a fully integrated delivery mechanism. It is a communications networking problem, requiring the interconnect of multiple distribution systems. And, it is a massive service packaging and consumer marketing problem. The right number and mix of services must be compatibly packaged together at reasonable prices if a threshold of consumer demand is to be achieved. Yet, despite these obstacles, the informative services industry promises tremendous growth over the decade. While projections vary, industry analysts estimate revenues will exceed $2.5 billion by 1985, rising to more than $10 billion by 1990. Driving the development of the information services industry are certain supply-related factors:

The skyrocketing costs of providing certain consumer services such as mail service, branch banking, and newspaper delivery. There is a need to provide these services in a more efficient and cost effective manner.

The need for greater efficiency in managing our natural resources such as oil, gas, water and electricity. To date the consumer has been driven by convenience; as natural resources become more scarce and more costly, the consumer will be driven by efficient utilization of our resources.

The need for businesses to develop new revenue streams. As operating costs continue to rise, information and service providers are looking for new ways to package and market their products, while network operators are examining new uses for their systems. At the same time, businesses such as the newspaper industry are attempting to protect their market share by early entrance into the information services industry.

The convergence of computers and telecommunications technologies. The proliferation of computer-based equipment in the commercial market has created demand among corporations for delivery of information in a more expedient and cost-effective manner.

Where does cable television fit in the overall information services industry? Cable is in a unique position, due to its significant bandwidth capacity, to deliver information services to the home and business markets. Cable TV has the ability to package together a variety of entertainment and non-entertainment video, data and audio services into an attractive programming mix. Cable systems also offer the opertional and marketing expertixe needed to secure and maintain significant subscriber penetration.

At the same time the cable industry has a need to develop new revenue sources. In the short term, cable needs to deliver new service offerings to meet its franchising commitments in the major markets. In the long term, if systems do not expand their existing services, they will reach a threshold level beyond which additional subscriber revenues will be minimal, although operating costs, will continue to rise.

Despite what appears to be a mutually beneficial relationship between the information services and cable industries, cable TV's ability to participate in this new industry is dependent upon a number of factors.

Competition with alternative transmission networks.
Availability of financing.
Development and long-term visability of services.
Consumer Demand.
Regulatory environment.

The cable industry is facing significant competition from other telecommunications networking systems in delivering information services—primarily from the telephone and broadcast industries, but also from services such as DBS, MDS, and DTS. It is CTM's position that no single communications distribution method has an overwhelming competitive advantage at this time, although both cable and the telephone industry should have significant roles to play. Unlike cable television, the telephone industry's entire network is in place. At the same time the broadcast industry has greater market penetration capability to deliver information services via teletext. Which, if any, industry will become the major provider of information services, is in part dependent on the technical, operational, and marketing capabilties used to make information services a viable operating business.

The capital and operating requirements to develop and launch information services exceeds the resources of most single corporations, with the possible exception of AT&T. For the cable industry, delivery of information services, will be, in the near-term, confined to the major markets where franchise commitments to build interactive systems have been made. It is estimated it will cost 100 million to wire 240,000 Boston homes, and 200 million to wire 400,000 Dallas homes. Outside the major markets, most cable systems will require significant upgrades of their plants before a full package of information services can be offered, which will also require a sizeable cable investment. Not surprisingly, cable operators are reluctant to commit significant capital until a proven information services business is defined. Outside the U.S., governments have subsidized the development of information services. In this country, corporations have formed joint ventures and partnerships to provide the needed expertise for service development and to defray their financial risk. The need to minimize financial exposure until proven consumer demand occurs will continue over the next five years.

Cable's penetration of the home and commercial marketplace is also dependent on the attractiveness, number and mix of programming services offered to homes and businesses. Just as creative program packaging of video entertainment services has enabled cable to reach its present subscriber penetration, so too will it affect cable's success in delivering information services. Cable is a strongly competitive position since it can benefit from its existing audio and video services to bring to market information access services, transactional services, messaging services and access to software programs.

There is little, if any, definitive, empirical evidence that significant home consumer demand exists. Development of information services will require extensive education, advertising and promotional conditioning of the marketplace. At the same time, the business market is more likely to exhibit early demand for information services due to this segment's familarity with computer-based equipment and its ability to purchase high-cost terminals. In the home market, cable has a competitive edge. The industry has developed successful marketing techniques and has an infrastructure in place through which it can influence consumer decisions. However, in the commercial market, cable does not presently have a strong competive posture. Unlike the telephone and microwave industries, cable has not yet serviced, to significant degree, the communications needs of business, although this scenario will likely change within the next few years.

It is important to note that home and business consumers are not concerned with how information services are transmitted. Much more important factors are cost of services, the overall mix of services offered, the friendliness and cost of user terminals, the software programs by which information is extracted, the delay time in responding to individual service requests and the quality of service.

Since I believe cable's role as a delivery system for information services will be determined in the marketplace, there is a strong need for a regulatory environment in which cable can effectively compete. I applaud the efforts of Senators Goldwater and Kasten and this subcommittee in attempting to legislate a free and equitable regulatory environment for the cable industry. By establishing a new title for cable television in the 1934 Communications Act, S. 2172 successfully provides a federal regulation framework for cable to compete as a national communications network rather than as an ancilliary service to the broadcast industry.

In the area of information services, the following provisions of the bill are particularly beneficial:

The assignment of federal jurisdiction over cable will eliminate much conflicting regulation which has previously hampered cable's ability to compete.

The establishment of a federally-imposed limitation on franchise fees will insure that cable is not used as a solution to the financial problems of local governments and will encourage the development on new consumer and business services.

The exemption of enhanced services from rate regulation is particularly necessary for cable to participate in the information services industry. Since the industry is still defining the business potential of information services, and since information services are still considered a signficant risk in the near term, and since there is little or no quantifiable information on appropriate charges for service nor how they should be structured, the imposition of rate regulations on enhanced services would be totally premature and inappropriate at this time. Furthermore, it could very much inhibit the development of new product offerings. However, I am somewhat concerned as to whether this provision in the bill will totally preclue the regulation of rates for information services. It is unclear whether or not municipal authorities could as part of the franchise process, require cable companies to make information services part of a basic cable tier thereby subjecting such services to basic cable rate regulations.

Legislating subscriber privacy protection is extremely beneficial to the development of information services. It provides a security to subscribers and creates a receptive environment in which new service offerings can evolve. The language of S. 2172 may however, be "overbroad," in that it appears to encompass even cable systems mailing lists.

While, overall, S. 2172 is a strong bill for supporting cable's ability to compete in the telecommunications market, there are two areas which may have adverse impact on cable's ability to deliver information services.

Section 613 directs the FCC to "ensure that cable system operators conform to technical standards necessary to promote * * * the compatibility of the receivers and other terminal equipment connected to such system by cable subscribers." This standard as written would place on cable operators the entire burden of assuring the compatibility of systems with whatever receivers and terminal equipment a subscriber may seek to connect to the system. On the physical level, (i.e. the shape, size, etc. of the cable interface) this is appropriate. On the intelligence level it is almost impossible for the cable industry to ensure compatibility with all terminal equipment a subscriber would like to attach to the system.

As the subcommittee is aware, there are numerous videotex systems already developed—Prestel Antiope, and Telidon are just the primary ones. These systems are themselves incompatible to varying degrees and would require different standards on the part of cable to provide an effective interface with each. The same point also holds true with data communications networks. CTM, as do others, believes that de facto standards will be set through marketplace competition. I would suggest that it behooves the cable industry to police itself by establishing minimum interface standards and take this burden off the Congress and the FCC.

My other major concern is with the 10 percent leased access requirements placed on cable systems with twenty or more channels. It is my understanding that this provision is to insure the development of new services; however, I believe it may in fact have the reverse effect.

The leased access requirement is detrimental to the development of information services. As I stated earlier, joint ventures and partnerships are standard in the development of information services. Cable brings to the table an established marketing and operations expertise which is valuable, and in some cases a necessity, to information services providers. At the same time considerable capital requirements for necessary headend and terminal equipment is needed and in many cases the rebuilding of cable plant. By its very nature leased access does not foster the cooperative environment needed for the launching of information services.

It appears that the S. 2172 is attempting to legislate a solution to a problem perceived to be down the road. However, I would argue do any of us know if 10 percent of channel capacity is too small or too great. I have stated that for information services to successfully penetrate the marketplace requires a creative mix of service offerings to meet and stimulate consumer demand; at this point neither the level of demand nor the appropriate service mix has yet been defined.

While I appreciate the attempt to solve a potential problem before it occurs I believe the more appropriate approach would be to build in a recourse to service providers through the FCC if documented abuse does occur.

As I stated to you in the beginning of my testimony, a substantial portion of my company, Communications Technology Management, Inc., is devoted to the development of information services. CTM is willing to compete in the cable marketplace for channel space on a joint venture basis, and I believe we will secure the necessary channels if our services meet consumer demand.

I would like to thank the Subcommittee for giving me this opportunity to appear before you today and hope that my remarks have given you additional insight into the role of the cable television industry.

Senator **Goldwater**. I apologize for not paying strict attention.

Mr. Gilchrist, your testimony makes clear that cable is substantially more than an entertainment service and, in fact, may serve as an important vehicle for providing a full array of public services. If this is true, how do you think this objective should be achieved? In particular, how can we insure that this important public service vehicle is made available universally throughout the country?

Mr. **Gilchrist**. The industry is growing today in an atmosphere of regulation. Over the past few years there have been instances of deregulation which has helped the industry to expand its current responsibilities. I think a continuation of his deregulation, coupled with the industry's growth in management and responsibility will insure that cable telecommunications will remain a viable service industry to all sectors of society.

Senator **Goldwater**. Mr. Bortz, cable operators are interested in maximizing the number of subscribers their systems can attract. One way to do this is to provide the widest possible array of programing that will attract a large and diverse audience. Do you believe that statutorily mandated access will further or frustrate this goal?

Mr. **Bortz**. I think, as I indicated earlier, the attempt to attract a large number of subscribers requires a marketing strategy, a marketing package. When they are competing for subscribers, to have effective competition, the competition needs to be four- or five-channel competition, not single-channel competition.

Programing that was not on cable could show up on MDS or STV. I represent sports interests as well, professional basketball teams, and we always prefer, obviously, to be in a position where there is STV, MDS, and cable. This is better than leased access.

If you mandate leased access for use of channels by programers, that will not enhance the development of cable. Those programs, the material that might be on leased channels might not fit into the marketing package, might not be of the quality the cable operator wants. And I think that any programer attempting to market a program package on a leased channel, being lost among 40 or 60 or 80 channels, is not going to succeed in the business anyway.

If he cannot work a deal with the cable operator, the single important thing is he has to have another way to go, whether that is satellite master antenna or DBS or MDS. If he has those alternatives available, then he can attempt to make his deal with cable. If he cannot make a deal with cable, he can go on to the others and you do not need this kind of regulation.

Also, once you go beyond requiring leased access, then you must ask what are the terms of leased access? Answering that is going to create, I think, an incredibly complex structure which is not going to do anything but retard the development of all of cable.

Instead, what I suggest is encourage the development of effective, multichannel competition and then let it be worked out in the marketplace.

Senator **Goldwater**. Thank you.

Mr. Reifenheiser, should franchise authorities have complete discretion when choosing a cable company to serve their community, and could you explain that?

Mr. **Reifenheiser**. I do not think I am qualified to answer that question. I have never been in the political arena. We look at things after the fact.

Senator **Goldwater**. Mr. Schmidt, would you like to take care of that?

Mr. **Schmidt**. I would like to try, Senator. Having had the opportunity to compete for franchises, and lose, I can tell you about the trials and tribulations of franchising. I do believe the community should make that decision as to who operates within their community. I think it is a very important nexus to what is going to be developed over the next decade; that is, bona fide local programing.

I think for that to happen, the community has to have that relationship with the cable operator.

I would differ with some of the prior testimony here as to the extent to which that relationship should be taken on. I think one of the ways of removing all of the hidden agendas here—that is, if you take the economic incentive away from the municipalities, I think I would take your comments at greater face value. I think they have a tremendous economic incentive to offset their general fund deficits by this new technology. I think until they purge that issue, I have a question about why they need all this authority.

Mr. **Bortz**. If I could comment. One of the early decisions I made when I left Washington and started my own consulting practice was that we would not assist cities in the cable franchising process. The reason was I could see the direction it was going, which was in part to see if the city can get more channels than the last city got.

Our study of consumer demand, which is what we are trying to satisfy, shows that the incremental value to a consumer of going from, say, a 30-channel system to a 50- or an 80- or a 100-channel system is miniscule. And our analysis for those who provide programs show that indeed if you start dividing the audience into 80 bits, you cannot stay in the business anyway. So over the long term there are not going to be 80 channels that will be filled with programing of value to the consummer.

My concern is that we already have—and I think Mr. Wheeler pointed out an estimate of cost—we already have a situation where local franchising has mandated the building of plant which has very little consumer value, and which substantially increases the cost of operation. When I advise noncable clients, we are going to take advantage of these cost burdens imposed on cable by coming in and competing against something which in some ways is a dinosaur. Competitors will come in with much less investment, without all of these mandated requirements, and will do well in the marketplace if they have at least four or five channels to sell.

So I think cable is already dragging along a rather heavy regulatory load, and certainly a cost load, that was not needed from any point of view in terms of consumer service.

Senator **Goldwater**. Thank you.

Well, this is not in this particular bill we are hearing this morning. But I have a feeling that it will be offered. So I would like to ask the panel what would be the impact of grandfathering all existing franchises? As I say, this bill does not take that approach, but I have a feeling that before we are too far down the road, the grandfathering thing will be around.

Mr. **Schmidt**. I am not sure I understand the context of the question, Senator. Grandfathering to the extent the existing franchise holder holds it in perpetuity?

Mr. **Coursen**. No; grandfathering would mean that the bill's provisions would not apply to any franchise currently in effect.

Mr. **Schmidt**. I do not think that is inherently beneficial. I think that the leverage that the community has against the operator—I do not think every cable operator is doing this 100 percent candidly—I think the municipality needs leverage against that operator. I think that franchise verification is an important piece of leverage that they have not utilized to the best interest of the community.

I do not know how this question applies in context. Again, if you grandfather a franchise holder and therefore remove that leverage from the community, I think you will open the door for future abuse.

Mr. Bortz. I would recommend against the grandfathering as well. I think, first of all, we are pretty far down the road in the franchising process. Grandfathering, as has been done in the past legislation, typically says we recognize there are a lot of small systems out there, let us exclude them from some of these regulations. A straight grandfathering now will include small and large systems.

A question I would like to ask is that given the current mix of systems, if you see fit to grandfather existing large systems out, is it desirable to impose these regulations on those yet to be franchised? If you do not impose these regulations on existing large systems, you should not do it for anybody.

Senator Goldwater. Did you have any comment?

Mr. Reifenheiser. We have made loans against franchises whose parameters we know and have a duration of so many years. We certainly do not like to make loans that are longer than the life of the franchise. If Federal law were to supersede some of the things, we do not know whether that would be useful or detrimental to the loans that we have already made.

I would think it would cause us great concern if it were something that would impair the economic viability of the system. And I think that mandatory access could well do that, depending upon how it would be applied. And it causes us great concern.

Senator Goldwater. Mr. Gilchrist, do you have any comment?

Mr. Gilchrist. I would just like to reinforce an earlier statement. The fact is that a great number of franchises have already been given, and if you are going to regulate only those that are yet to be awarded, I think the bill would not be in effect a piece of legislation from a financial point of view.

The viability of the business is the most important thing. Any part of this legislation that would endanger a company's ability to repay its debt or to raise capital in other forms would most certainly have an adverse effect on the industry.

Senator Goldwater. We want to thank you gentlemen very much for being with us.

The last panel for the day will be Mr. Ralph Swett, president of the Times Mirror Cable Television, Inc.; the Honorable Paul Steele, mayor of the city of Wheeler, Oreg.; Mr. Edward Kearse, executive director of the New York State Commission on Cable Television; and Mr. James Monroe, president of the Arizona Cable Television Association.

STATEMENTS OF RALPH J. SWETT, PRESIDENT, TIMES MIRROR CABLE TELEVISION, INC.; HON. PAUL STEELE, MAYOR, CITY OF WHEELER, OREG.; EDWARD KEARSE, EXECUTIVE DIRECTOR, NEW YORK STATE COMMISSION ON CABLE TELEVISION; AND JAMES A. MONROE, PRESIDENT, ARIZONA CABLE TELEVISION ASSOCIATION

Senator **Goldwater**. Gentlemen, we will start off with Mr. Ralph Swett, and the same rules apply to you gentlemen.

Mr. **Swett**. Mr. Chairman, members of the subcommittee, thank you for the opportunity to be here today. My name is Ralph Swett, president of Times Mirror Cable Television and vice president of the Times Mirror Co. in Los Angeles.

The Times Mirror Cable Television is the seventh largest cable system operator in the country, and of special interest to you, Mr. Chairman——

Senator **Goldwater**. Would you pull your microphone a little closer, please?

Mr. **Swett** [continuing]. The company now owns 50 percent and began managing the American Cable Television System in Phoenix, Ariz., last month. By the way, out of choice, you will not be seeing the X-rated movies on our system.

Senator **Goldwater**. I know that.

Mr. **Swett**. As general background, though, I would like to emphasize the prior testimony that cable competes with an ever-expanding array of technology. It also provides mass media and information services, that is television stations, the MDS, the STV, video cassettes, satellite master antenna systems, video disk, movie theaters and the sports arena, also multichannel MDS, low-power television stations, and DPS promises additional competition in the future.

Mr. Chairman, I want to congratulate you and other cosponsors of S. 2172. Your bill recognizes that it is essential that cable be permitted to compete freely and fairly with other providers of video service without unnecessary and discriminatory restrictions imposed by Government at any level. The Times Mirror supports the early enactment of legislation which is built upon this principle.

Mr. Chairman, because your bill recognizes cable as an important part of our national telecommunications system, Federal jurisdiction should be paramount. Those specific areas where there is an overriding Federal interest, where there is an absence of regulatory authority may be left to the States or municipalities, but not both. I understand that the bill is intended to assure the primacy of the national telecommunications policy. This approach is commendable. The national policy set forth in the bill must be definitive.

I also recommend, Mr. Chairman, that the bill's impact on rate regulations be clarified [illegible] the interest of fulfilling the bill's purpose.

It should clearly preclude rate regulation of pay cable services at every level of government. As nonessential service in competition with other similar services, pay cable should be subject only to market forces.

Rate regulation of basic service must also be carefully circumscribed. If there are alternative video services readily available in a particular marketplace, marketplace competition should set the rates. The bill should define as precisely as possible the meaning of alternative video services.

With respect to other issues raised by the bill, the Times Mirror is pleased to note that the bill requires the FCC to establish a ceiling on franchise fees. A reasonable fee for the use of city conduits is appropriate. I recommend, however, that the bill make it clear that permissible franchise fees may not discriminate unfairly against cable, and that the fees specifically be limited to the cost of regulation. In addition, the computation of the fee should include any monetary requirements imposed on it.

The sports blackout provision of the bill is of particular concern to the Times Mirror. This section will drastically increase the ability of professional sports teams to force blackouts of competing sports programing.

The provisions of the bill are much broader than present FCC rules and, in our judgment, devastating to the growth of cable television. For example, under the terms of the bill, the Chicago Cubs would have the right to keep Chicago area cable subscribers from seeing yesterday's New York Mets/Montreal game carried on WOR-TV, New York, as well as the San Diego/Atlanta contest broadcast yesterday afternoon by WTBS.

In fact, the bill would permit the Cubs to prevent Chicago area cable operators from showing any National League baseball contest at any time on any cable system within 50 miles from Wrigley Field. It would make no difference if the Cubs played in the afternoon and the cable operator wished to show another baseball game that night. It would in fact make no difference if the Cubs were not even playing.

We have several cable systems where sports have been shown for 10 years or longer that would be taken away from our subscribers. I urge you, Mr. Chairman, to delete the sports blackout provision from the bill.

In general, the Times Mirror supports the legislation and looks forward to assisting you and other members of the subcommittee in any way we can. That concludes my statement. I previously submitted more comprehensive testimony and I would be happy to answer any questions.

[The statement follows:]

STATEMENT OF RALPH J. SWETT, PRESIDENT, TIMES MIRROR CABLE TELEVISION, INC.

Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to be here with you today. My name is Ralph Swett. I am President of Times Mirror Cable Television located in Irvine, California, and vice president of its corporate parent, The Times Mirror Company, headquartered in Los Angeles.

Times Mirror Cable Television is the seventh largest cable system operator in the country. The company has 675,000 basic subscribers and more than 425,000 subscribers to pay television services. Of special interest to you, Mr. Chairman, the company has a 50-percent interest and management control of the American Cable Television system in Phoenix, Arizona. In addition, in 1981 Times Mirror assumed a 50-percent ownership, including management control, of the cable system in the greater Las Vegas and Clark County areas of Nevada.

Times Mirror Videotex Services, a subsidiary of Times Mirror Cable, was formed in 1981 to conduct a field trial of a two-way home information delivery system. A nine-month test involving 350 Southern California homes began in March, 1982. Volunteer homes receive modified television sets thats are linked to a central computer via either cable or telephone lines. Information is called to the screen by means of a hand-held keyboard. Services such as tele-shopping, home banking, ticket reservations, airline schedules, and information from newspapers, magazines, and numerous other sources are available. Three thousand of the 20,000 page data base will be updated or replaced each day.

Also in 1981, Times Mirror Satellite Programming, a subsidiary of Times Mirror Cable, inaugurated Spotlight, a 24-hour-a-day premium movie service. Subsequently, the company entered into an agreement with several other multiple system operators who became partners in Spotlight.

As you can see, Mr. Chairman, Times Mirror is involved in providing a variety of electronic information and entertainment services to the public. It is important, however, to place Times Mirror's activities in the overall context of the cable industry.

Even as the cable industry stretches its resources to exploit the full range of enhanced communications technologies, it remains essentially a collection of relatively small business enterprises. The largest single system serves about 200,000 subscribers out of a total of 19 million; and the smallest approximately 100. The average system subscribership for the largest Multiple System Operators is 11,000 and for the 25 largest systems about 75,000 subscribers.

In addition, cable competes with an ever-expanding array of technologies that also provide mass media and information services. Cable programming competes with television broadcast stations, multipoint distribution systems (MDS), subscription television stations (STV), videocassettes, videodiscs, movie theaters, and sports arenas. Multichannel MDS services, low power television stations (LPTV), and direct broadcast satellites (DBS) promise additional alternative pathways for the distribution of video services. Far from being a monopoly industry characterized by undue concentration, cable is facing formidable competition in every facet of its operations. Times Mirror must summon all of its resources to retain the same market share it has traditionally held.

Mr. Chairman, with the foregoing background, I want to take this opportunity to congratulate you and the other cosponsors of S. 2172. The bill represents a significant, and substantial step forward in developing an appropriate regulatory role for the government in cable television. Your bill comes at a truly critical point in the evolution of cable. As the video services market expands and the choices for consumers multiply, it is essential that cable be permitted to compete freely and fairly with other providers of video services without unnecessary and discriminatory restrictions imposed by government at any level. Your bill recognizes that if cable is to develop and evolve as a "medium in its own right" pursuant to an appropriately established national policy, cable systems must be "allow[ed] to compete in the marketplace with other providers of telecommunication services" on an equal basis. Times Mirror supports the early enactment of legislation which is built upon this principle.

Mr. Chairman, as you know, in recent years the FCC has been reducing its regulatory requirements on cable. For an industry that has been long overregulated in an effort to protect existing video services, deregulation is a welcome change. However, the very real danger exists that unless Congress enacts clearly articulated jurisdictional boundaries, state and local governments will fill the void with regulatory restraints that will unfairly inhibit cable's growth. Already there have been instances where the burdensome requirements of unnecessary and sometimes inequitable local regulations have deprived consumers of cable services that would otherwise have been available.

The most important ingredient of cable legislation in the public interest is to establish guidelines under which Federal, State and local regulation of cable may be imposed. Consistent with your other legislative efforts in telecommunications and broadcasting, government should be precluded from regulating cable whenever competition exists in a defined geographic or service market.

Because your bill recognizes cable as an important part of our national telecommunications system, federal jurisdiction should be paramount. In those specific areas where there is no overriding federal interest, regulatory authority, to be exercised only in the absence of competition, may be left to the states or municipalities (but not both).

Mr. Chairman, your bill makes some initial—and perhaps tentative—decisions about where regulation is appropriate. Whatever decisions the Congress finally makes about the imposition of regulation by any level of government, the Congress must ensure that under appropriate conditions, these regulations can disappear with a minimum of delay. Without clear guidelines, those who wish to preserve the status quo despite substantial changes in the marketplace will be encouraged to engage in lengthy litigation to protect their interests.

"Competition" will be in the courts and before federal and state administrative bodies instead of the marketplace where it belongs. As you have said many times before, Mr. Chairman, this kind of competition benefits no one except the lawyers.

My understanding is that the bill is intended to assure the primacy of national telecommunications policies. This approach is commendable. These new national policies set forth in the bill must be definitive. If they are anything less, the legislation will result simply in reinforcing the uncertainty of the status quo.

The bill is obscure on precisely what matters remain subject to franchise negotiation. I urge the subcommittee to take particular note of what many experts believe is the market power leverage of municipalities, particularly in the refranchising process where millions of dollars worth of investment may be at stake.

I also recommend, Mr. Chairman, that the bill's impact on rate regulation be clarified. As you know, the courts have held that rate regulation of pay cable as currently preempted by the FCC is within the jurisdiction of the Federal Government. In the interest of fulfilling the bill's purposes to allow, without artificial restrictions, the continued growth of cable, it should clearly preclude rate regulation of pay cable services at every level of government. As a non-essential service, in competition with other similar services, pay cable should be subject only to marketplace forces.

Rate regulation of basic service must also be carefully circumscribed. If there are alternative video services readily available in a praticular market, marketplace competition should set the rates. The bill should define as precisely as possible the meaning of alternative video services. For example, rate regulation should be allowed only when a minimum level of broadcast services (perhaps the three networks and one PBS station) are not available off the air. The cable operator should have the discretion to add other services as part of a basic service package, without subjecting them to rate regulation. Provisions in the bill are not in conflict with these recommendations.

With respect to other issues, Times Mirror is pleased that the bill requires the FCC to establish ceilings on franchise fees. A reasonable fee for the use of city conduits is appropriate. But the bill should make clear that permissible franchise fees may not discriminate unfairly against cable, and that the fees specifically be limited to the cost of regulation. Mr. Chairman, in the past you have strongly and persistently advocated that fees charged by the FCC be based upon the cost of regulation. In addition, the computation of the fee should include any other monetary requirements imposed on cable.

Times Mirror is also pleased that the bill requires municipalities to pay fair market value for cable systems and will no longer be able, as a condition of franchise, to compel sale at less than fair market value. Fairness to cable investors who have taken the financial risks requires nothing less.

The sports blackout provision is of particular concern to Times Mirror. This section will drastically increase the ability of professional sports teams to force blackouts of competing sports programming.

The bill is much broader than present FCC rules, and, in our judgment, devastating to the growth of cable television. Under terms of the bill, the Chicago Cubs would have the right to keep Chicago area cable subscribers from seeing yesterday's New York Mets-Montreal game carried on WOR-TV, New York, as well as the San Diego/Atlanta contest broadcast yesterday afternoon by the Atlanta superstation, WTBS. In fact, the bill would permit the Cubs to prevent Chicago area cable operators from showing any National League baseball contest at any time on any cable system within 50 miles from Wrigley Field. In would make no difference if the Cubs played in the afternoon and the cable operator wished to show another baseball game than night. It would in fact make no difference if the Cubs were not even playing.

Times Mirror Cable has evaluated the impact of the proposed sports rules on their cable television markets. In the Philadelphia area, we currently serve over 40,000 subscribers. Our regional manager says that all professional sports leagues have franchises within his region. Each of these franchises maintans a home stadium. He says that local teams have consistently demanded protection under current FCC rules. The blackouts required by current rules create confusion with most of our cable subscribers and complaint calls inundate our offices and answering services. If the bill is adopted, our cable system might not be permitted to carry professional sports events from WOR-TV or WPIX in New York; WGN-TV, Chicago; WTBS, Atlanta; or USA Network. He believes there will be a substantially increased number of blackouts in the Philadelphia area, impacting the cable systems' operating costs by requiring additional manpower to track, implement and document professional sports coverage. Ultimately, these costs must be passed on to subscribers. Of greater importance, however, is that the general public will have many sporting events they currently enjoy taken away from them and simply will not understand the imposition of a broad new rule as contemplated in the bill. Subscriber loss is likely to occur if the attractive sports programming which has been available to subscribers for the past ten years is suddenly removed.

In Phoenix, Arizona, our new cable system which is under construction will be negatively impacted if the local NBA team, the Phoenix Suns, denies cable carriage for the attractive NBA contests featuring the Chicago Bulls from WGN-TV, the Hawks from WTBS, the Knicks from WOR-TV, and the extensive series of NBA telecasts presented by USA Network.

I could provide additional comment from other managers across the nation and with your permission will do so for the record. Times Mirror is convinced that this provision would have a devastating impact in two significant ways. It will remove attractive sports programming from millions of cable television subscribers across the nation—programming which many subscribers have enjoyed for years. Secondly, it will remove one of the most significant reasons for subscribing to cable television services. It is my belief that cable operators nationwide could conceivably attract 10 to 20 percent fewer subscribers because of the lack of attractive sports programming. This potential loss of subscribers could undermine the financial viability of most new cable systems currently under construction and in the future force operators to reduce other services they now provide to the public.

I urge you, Mr. Chairman, to delete this provision from the bill.

Mr. Chairman, thank you again for the opportunity to testify. I hope that Times Mirror's suggestions are useful to you and the other members of the subcommittee as you continue to work for the early enactment of much needed cable legislation. We at Times Mirror look forward to assisting you in any way that we can.

That concludes my prepared statement. I will be happy to answer your questions.

Senator GOLDWATER. Thank you very much. Now we will ask Mayor Steele to testify.

Mr. STEELE. Thank you, Mr. Chairman. My name is Paul Steele. I am the mayor of Wheeler, on the north Oregon coast. I have been asked by the League of Oregon Cities to represent the State of Oregon and its more than 200 cities, the vast majority of which are under 10,000 in population.

Cable television is not a new thing to many of us in Oregon. Some of our cities have had cable for over 30 years. What is new is that cable technology has finally reached the stage where it can deliver services that go beyond the mere retransmission of broadcast signals.

As you know, cable TV is much more than just an investment for the wealthy or a multichannel circus for the masses. Some of us will soon have interactive services for information retrieval, extended opportunities for local origination, institutional services for education and government, and perhaps as important as any of these, community programing produced and controlled by citizens themselves.

Public access programing is a concept whose time has finally come. The miniaturization of equipment has made it possible physically and financially for motivated ordinary citizens to master the tools of communicating by television.

In the international arena, there is a term used called technology transfer. At our local level we have a powerful need for something one could call information transfer. If you put the possibility of nuclear war aside, the future of America is in its neighborhoods. We need the ability to share and transfer information neighborhood by neighborhood. In some cases like mine, the entire city is small enough to be one neighborhood. In most cases our cities have tens or even hundreds of neighborhoods.

Right now in this decade we are forming electronic linkages with each other that transcend geographical and political boundaries. With the help of cable technology we are forming new neighborhoods, bounded now more by the energy and determination of our citizens and held together by the need to address problems of mutual concern in areas of common interest.

Indeed, what was once a vision is now becoming a reality. But today there is something that clouds that vision and clouds that reality. Unintentionally or inadvertently, S. 2172 represents legislation that, if enacted, would, in the main and over the long haul, be an impediment, a burden, and a sad disservice to the public we represent.

For all its minor adequacies, and there are a few, it nevertheless has major flaws. I can not take the time to go over them all, so allow me to call attention to the list of problems that we have compiled. We respectfully suggest that you direct staff to address them in detail. For now I would like to give you some of the principal complaints.

No. 1, as S. 2172 presently reads, the Federal Government claims exclusive jurisdiction in the areas of ownership, public access, rate regulation, and franchise fees. I wish to be polite, but I must tell you that we regard this unilateral preemption of local authority as outrageous. Does Congress also wish to assume the cities' rights and responsibilities for franchising other services like telephone and electric power? Can you imagine the litigation and chaos that would ensue?

Here is a bill which purports to foster a medium which will become responsive to the needs and the interests of the public and yet which totally fails to mention the role of local government in ascertaining those needs and interests. Worse, this bill takes away powers at a time when the New Federalism is supposed to return power to the cities, counties, and States. At a time of supposed deregulation, here we see legislation that would require more Federal bureaucratic superstructure to do what cities have been doing right along.

Two, this bill would prevent cities from negotiating with bidders competing in the open marketplace on key provisions of franchises that satisfy local conditions and local needs. This is wrong. The FCC cannot possibly substitute its judgment for that of local government and expect to regulate with superior expertise.

Three, this bill defines basic service as merely the retransmission of broadcast signals and any other service, as determined by a cable operator. You mean a city has no right to put out an RFP for basic service that includes local origination and community access? You better tell that to the city of Portland, then, because that is what they did and successfully concluded negotiations on a major new franchise. Are you going to tell those of us who have tailored our agreements to our needs that our franchises are null and void?

Four, this bill sets the maximum number of access channels permitted. This is either wrong headed or a clumsy mistake, really. The Federal Government should reaffirm that our first amendment freedoms include the electronic media. It should set minimums, not maximums.

Finally, this bill errs in the way it regulates rates. Rates and fees should be determined through the franchise process, a system much more flexible than Federal law. This bill is wrong in its approach to municipal ownership. It is wrong when it mandates only first-come first-serve programing on public channels and it is wrong when it bans concepts similar to the fairness doctrine and equal time for publicly programed channels.

Yet in spite of all this, let me conclude by saying that we feel that the Congress and the FCC do have a proper role. You should set technical standards. You should prevent program piracy. You should prevent undue concentration of ownership. You should insure subscriber privacy and you should mandate minimum public access. But right now this bill protects the cable operators at the expense of the public.

Please, Senator, regulate this adolescent industry lightly at first to see what patterns of use and abuse emerge. Drop this one-sided, old-fashioned, paternalistic approach that this bill includes at present. Our cities and neighborhoods need better legislation from you than S. 2172.

Thank you very much.

Senator **GOLDWATER**. All right, Mr. Kearse.

Mr. **KEARSE**. Thank you very much, Senator. I am Ed Kearse. I am the executive director of the New York State Commission on Cable Television. In earlier lives I have been the corporation counsel for the city of Syracuse, its de facto deputy mayor, and I have been the district attorney of Onondaga County. As the corporation counsel, I was the principal proponent of the first interactive system in America, which is presently built, although the involvement with the city council caused it not to be the first on the streets. It was the first conceived, however. I was also the principal proponent of the first municipally owned system. That never happened in Syracuse.

I appreciate the opportunity to appear here before this committee to comment on the proposed Cable Telecommunications Act of 1982. Because of the time restrictions, I will limit my remarks to New York State's experience in regulating cable and why I believe that cable television should continue to be regulated primarily by the States and not by the Federal Government. The Commission's comments on the specific provisions of the bill will be submitted to you in writing within a few weeks.

The New York State Commission on Cable Television was created as an independent agency to regulate cable television by the State legislature in 1972. The legislation, which paralleled the rules of the FCC, declared that cable television was a matter of State concern, just as much so as education, health, safety, transportation, and recreation.

At this time there are only 11 other States that directly regulate cable and only 3 of those have commissions separate from their State public utility commissions. However, because of the recent Boulder, Colo., decision I believe the nonregulatory States will provide some form of regulation of cable in order to protect their municipalities from antitrust liability.

The New York State Commission does not regulate cable as a public utility. It does not approach cable as a PUC would the telephone company. The main differences are that we do not regulate rates on a rate base rate-of-return basis and that we promote the development of cable television with a minimum of regulation.

By law, no cable television system may operate in the State without a franchise from each municipality it serves. However, except for systems serving less than 1,000 subscribers, no franchise is effective until it is certified by the commission.

The commission is mandated to develop a statewide plan for the development of cable television, to provide advice and assistance to municipalities and to develop standards and procedures for municipalities to follow in granting franchises. The commission also prescribes standards for construction, operation, technical performance, and safety of cable systems, as well as other minimal standards for inclusion in all franchises in the State of New York.

Ninety-six percent of the people in New York live in municipalities which have either franchised a cable operation or are in the process of doing so. We project that the industry's gross revenues in 1982 will be approximately $350 million. This represents a 1,000-percent growth since this commission began in 1973. Cable growth in New York from December 1980 to June 1981 exceeded that of California, Pennsylvania, and Texas, three States that do not have cable commissions chared with promoting the industry and protecting the public interest.

New York's rapid growth in cable was accomplished with a minimum of conflict between the cable industry and State and local governments because of our definite, clearly articulated policy and rules for cable franchising and development. Contrast this to the fits and starts of the Federal Government's approach to cable—the FCC's disinclination to regulate the industry in the 1960's, then its inability to do so after adopting comprehensive and restrictive regulations in the 1970's, and then its final withdrawal from regulation in the 1980's.

Needless to say, the cable industry was put through the wringer by the Federal Government. Why go back to Federal regulation at a time when the Federal Government is trying to give powers back to the States?

This brings me to my main objection to the Telecommunications Act of 1982. The bill is an unnecessary interference by the Federal Government in matters of State and local concern. It disrupts the balance between Federal and State jurisdiction as provided in the 10 amendment to the Constitution.

Cable signals go not 1 inch beyond the end of the cable. They stop at State lines. We believe, given the local nature of cable, a broad Federal preemption of the State and local police power as proposed by this bill is ill-advised and may unconstitutionally infringe on State sovereignty.

Particularly troublesome are those areas of regulation which are specifically preempted by the bill, which I believe are truly matters of State concern. They are ownership, access, rate regulation, franchise fees, health, safety, and consumer issues. These subjects are not in their nature national, nor do they admit only of one uniform system or plan of regulation so as to require exclusive jurisdiction by Congress.

As to access and franchise fees, our experience has shown that these subjects are truly of primary local concern. In *NARUC* v. *FCC* the court held that the FCC could not preempt point-to-point nonvideo channels becuase it was regulation of intrastate communications for hire via cable. Access as an outlet for local expression was recognized—I will stop here, but I would just appreciate your forebearance if I note that in the State of New York we have 1,545 municipalities that we are regulating.

They range from the city of New York to some cable systems that are serving only 17 people within a franchise. I would point out to you that a State system has the ability to be flexible and a Federal system certainly would not be able to take care of the differing problems presented by a system with 17 people in it and a system with 2.4 million people in it.

That is why if you are going to have standardized rules, at least permit the States to have a role in this so that the flexibility at the local level can be achieved.

Thank you.

[The statement follows:]

STATEMENT OF EDWARD P. KEARSE, EXECUTIVE DIRECTOR, NEW YORK STATE COMMISSION ON CABLE TELEVISION

I am Edward P. Kearse, Executive Director of the New York State Commission on Cable Television. I appreciate the opportunity to appear before this Committee to comment on the proposed "Cable Telecommunications Act of 1982." Because of the time restrictions I will limit my remarks to New York State's experience in regulating cable and why I believe cable television should continue to be regulated primarily by the states and not the Federal Government. The Commission's comments on the specific provisions of the bill will be submitted to you in writing within a few weeks.

The New York State Commission on Cable Television was created as an independent agency to regulate cable television by the State Legislature in 1972. The Legislation, which paralleled the rules of the FCC, declared that cable television was a matter of state concern, just as much so as education, health, transportation and recreation.

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New York's rapid growth in cable was accomplished with a minimum of conflict between the cable industry and state and local governments because of our definite, clearly articulated policy and rules for cable franchising and development. Contrast this to the fits and starts of the federal government's approach to cable. The FCC's disinclination to regulate the industry in the 1960's. Then its inability to do so after adopting comprehensive and restrictive regulations in the 1970's. Then its final withdrawal from regulation in the 1980's. Needless to say the cable industry was put through the wringer by the federal government. Why go back to federal regulation at a time when the federal government is trying to give powers back to the states.

This brings me to our main objection to the "Telecommunications Act of 1982." The bill is an unnecessary interference by the federal government in matters of state and local concern. It disrupts the balance between federal and state jurisdiction as provided in the 10th Amendment of the Constitution.

Cable signals go not one inch beyond the end of the cable. They stop at state lines. We believe, given the local nature of cable, a broad federal pre-emption of the state and local police power as proposed by this bill is ill-advised and may unconstitutionally infringe on state sovereignty.

Particularly troublesome are those areas of regulation which are specifically preempted by the bill, which I believe, are truly matters of state concern. They are ownership, access, rate regulation, franchise fees, health, safety and consumer issues. These subjects are not in their nature national, nor do they admit only of one uniform system, or plan of regulation so as to require exclusive jurisdiction by Congress.

The FCC at the height of its regulatory activity recognized the state's right to regulate the ownership and rates of cable systems. As to access and franchise fees experience has shown that these subjects are truly of primary local concern. In NARUC v. FCC the court held the FCC could not preempt point to point non video channels because it was regulation of intrastate communications for hire via cable. Access as an outlet for local expression was recognized by the FCC and forceably promoted until the MidWest Video II decision. What is the federal interest or purpose in limiting access to 10 percent of channel capacity? Who is better situated to determine the needs of each locality? The federal government or local officials? Is the federal government equipped to determine the needs of every municipality in the United States let alone the 1,500 located in New York State?

Franchise fees are solely a matter of local concern. A cable system occupys the public streets. The value for the use of a public street is like any other piece of real estate. The more income it can generate the higher its value. The streets of New York City are more valuable than those of Penn Yann. Congress's limitation on local franchise fees amounts to a taking of public property without just compensation in violation of the Constitution.

The bill also goes too far in delegating power to the FCC. The power is so broad that it nullifies the stated purpose of the Act "to create a jurisdictional framework which apportions the authority to regulate cable systems between the Federal Government" and the states.

In *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, the court noted that when conferring upon Congress the regulation of commerce, the Constitution never intended to cut the state off from legislating on all subjects relating to the health, life, safety and welfare of its people.

Cable systems, though a part of interstate commerce, still retain features which are particularly local. Cable constitutes the last stage of the interstate transmission of television signals. (just as the local telephone loop). Such a system has incidents "much more local than national, involving cable equipment through the streets, local franchises, local intra-state advertising and selling of services and local intrastate collections. *TV Pix, Inc.* v. *Taylor,* 304 F. Supp. 459. And I might add local intra-state signals.

The Supreme Court in *NLRB* v. *Jones and Laughlin Steel Corp.,* 301 U.S. 1, noted that federal power should not extend to embrace effects upon interstate commerce which may prove so indirect and so remote that to do so would undermine federalism and create a centralized government.

The provision of the bill which prohibits any state law on any subject matter of the bill fails to recognize that states may regulate in the same areas as the federal government so long as there is no conflict between federal and state goals. I submit there is not now any conflict between federal and state goals in the area of promoting the development of cable television and a total usurpation of a state's right to regulate in these areas is unnecessary and thus the "Cable Telecommunications Act of 1982" is unnecessary.

Thank you again for the opportunity to present our views to this Committee. I would be glad to answer any questions you may have.

Senator GOLDWATER. Thank you very much.

Mr. Swett, I have a few questions on these public access channels. I wonder if you could tell us how the cable industry now handles its obligations for public, educational, and governmental access channels. For instance, what local, regional or national organization interests now use presently available access channels?

Mr. SWETT. Let me start by saying what the industry's policies are. Our policies are, I am sure, consistent with most of the other companies. We are expanding our public access channels without Federal legislation. So therefore we really do not think there is a need for such legislation.

But at this time we are working with the local communities to provide the Government access channels, the educational institutions, and whatever other community groups that we determine need that service in the local community. So it is a varied group, and I think most companies are following a process of making local ascertainments and deciding who needs the channels.

Senator GOLDWATER. Jim, I did not overlook you. I just wanted to get that point cleared up before we got onto you. So now I will ask Mr. James Monroe of Arizona.

Mr. MONROE. Thank you, Senator.

I speak to you today on behalf of the Arizona Cable Television Association, the trade association of the cable television industry in the State of Arizona. ACTA represents approximately 60 cable systems in the State of Arizona, one-third of which are individually owned and operated. I myself am an owner-operator of two relatively small systems in Arizona, one located on the San Carlos Indian Reservation and the other one located in the Pima County area adjacent to the city of Tucson.

In general, we are pleased with S. 2172's concept of definitively delegating authority over cable television to the Federal Communications Commission. There are, however, several provisions of the bill that the members of the Arizona association feel need to be addressed.

First and foremost, we believe that no government entity should be in the business of owning or operating a cable television system. Section 605(3)(c) is an excellent beginning to limiting such ownership. However, we believe that it does not go far enough.

We believe that ownership of a cable television system by any State or municipality should be prohibited. Municipal ownership under any conditions can lead to the dangerous situation of Government control over communications. Such control is not to the benefit of your constituents and clearly indicates to me constitutional concerns.

Prohibition of controlling a program on a municipally owned system is not a practical restriction, as it would be relatively impossible to own and/or run a cable system without having some control either directly or indirectly on programing. Programing is the core of the cable television system and the program choices may determine whether the system would be successful or unsuccessful.

In the last 2 years, several Arizona cities have discussed municipal ownership and have instead adopted in their licensing ordinances what are termed buy-back clauses. Such clauses will allow municipalities to purchase the system at the expiration or termination of the license. These Arizona ordinances use several different valuation terms upon purchase of the system, ranging from book value to going-concern value.

These definitions set the value of the cable system to be the cost of tangible property less accumulated depreciation. No value may be assigned to good will, profit expectation, or to the license itself.

In my testimony that I submitted, I did put in an addendum that comes from the city of Scottsdale that addresses such a problem. In several Arizona ordinances, the term "fair market value" was discussed as a possible valuation term. However, even in these draft ordinances the definition of "fair market value" read identical to the definitions used in other Arizona ordinances for book value and going-concern value.

The ability of each ordinance being able to define the valuation term can create many different interpretations of what the term "fair market value" actually means and may allow the licensing authority to purchase a system at substantially less than what the system is actually worth.

We support total prohibition of municipal ownership, but due to our experience in Arizona we would also advocate that if this committee determines that total prohibition of municipal ownership is not an acceptable alternative, then, at the very least, the term "fair market value" found in this section ought to be defined in the legislation. Such a definition can be found in general accounting principles and is listed in the American Institute of Certified Public Accountants of Professional Standards, vol. 3, par. AC, subsection 5363.013 (see addendum 2).

Second, we have concerns regarding section 607, rate regulation. We support the existing concept of prohibiting regulation of pay services. However, we do not believe the licensing authority should be allowed to regulate basic services.

Cable television is a private enterprise operation that must make its way in the marketplace just as any other business. With the growth in low power television, satellite-to-home transmission, and microwave transmission capacity, cable competition becomes fiercer. Basic service rate regulation will hamper the ability of the cable operator to compete equally in the video marketplace.

Supporters of rate regulation indicate that such authority allows better control over consumer rights and customer services. However, rate regulation in Arizona has not proven to make a substantial difference in basic rates charged. Out of 66 systems in Arizona, only 15 have rate regulation. The difference in the average basic rate charged by the regulated systems versus nonregulated systems is approximately 20 cents per month.

In Arizona, it appears that the marketplace concept is indeed doing its job. Cable television is a competitive service and should therefore be treated as such and not be hampered with unnecessary rate regulation that will cause interference in the marketplace.

Finally, we are concerned that S. 2172 fails to continue the authority of the Federal Communications Commission to regulate the rates, terms, and conditions of pole-attachment agreements between cable television and public utilities. We believe that this is a necessary function of the FCC in order to maintain fairness and equity among all the parties concerned in pole-attachment agreements. We encourage you to consider the inclusion of an extension of the FCC's existing authority in this area.

Arizona operators are not unique in their needs or problems. Our concerns are shared nationwide. On behalf of my fellow operators in Arizona, I urge you to consider my views in the area of municipal ownership, rate regulation, and pole, attachment fee jurisdiction as you continue your deliberations on S. 2172.

[The statement follows:]

STATEMENT OF JAMES A. MONROE, PRESIDENT, ARIZONA CABLE TELEVISION ASSOCIATION

Thank you, Mr. Chairman. I speak to you today on behalf of the Arizona Cable Television Association, the trade association of the cable television industry in the State of Arizona. ACTA represents approximately 60 cable systems in the State of Arizona, one-third of which are individually owned and operated. I, myself, am an owner/operator of two (2) relatively small systems in Arizona, one located on the San Carlos Indian Reservation and the other one located in the Pima County area.

In general, we are pleased with S.B. 2172's concept of definitively delegating authority over cable television to the FCC. There are, however, several provisions of the bill that the members of the Arizona association feel need to be addressed. First and foremost, we believe that no government entity should be in the business of owning or operating a cable television system. Section 605(3)(c) is an excellent beginning to limiting such ownership; however, we believe that it does not go far enough. We believe that ownership of a cable television system by any state or municipality should be prohibited. Municipal ownership, under any conditions, can lead to the dangerous situation of government control over communications. Such control is not to the benefit of your constituents and clearly indicates to me constitutional concerns. Prohibition of controlling a program on a municipally owned system is not a practical restriction, as it would be relatively impossible to own and/or run a cable system without having some control, either directly or indirectly, on programming. Programming is the core of a cable television system and the program choices made determine whether the system will be successful or unsuccessful.

In the past two (2) years, several Arizona cities have discussed municipal ownership and have, instead, adopted in their licensing ordinances what are termed "buyback" clauses. Such clauses will allow municipalities to purchase a system at the expiration or termination of a license. These Arizona ordinances use several different valuation terms upon purchase of the system ranging from book value to going concern value. However, expanded definitions of these various valuation terms basically all read the same. These definitions set the value of the cable system to be the cost of tangible property less accumulated depreciation. No value may be assigned to good will, profit expectation or to the license itself. (See Addendum 1.) In several Arizona ordinances, the term "fair market value" was discussed as a possible valuation term. However, even in these draft ordinances, the definition of "fair market value" read identical to the definitions used on other Arizona ordinances for book value and going concern value. The ability of each ordinance being able to define the valuation term can create many different interpretations of what the term "fair market value" actually means and may allow the licensing authority to purchase a system at substantially less that what the system is actually worth.

We support total prohibition of municipal ownership, but due to our experience in Arizona, we would also advocate that if this committee determines that total prohibition of municipal ownership is not an acceptable alternative, then, at the very least, the term, "fair market value," found in this section, ought to be defined in the legislation. Such a definition can be found in general accounting principles and is listed in the American Institute of Certified Public Assountants of Professional Standards, Volume 3, Paragraph AC, Subsection 4363.013 (see Addendum 2).

Secondly, we have concerns regarding section 607—Rate Regulation. We support the existing concept of prohibiting regulation of pay services; however, we do not believe the licensing authority shold be allowed to regulate basic services. Cable television is a private enterprise operation that must make its way in the marketplace just as any other business. With the growth in low-power television, satellite-to-home transmission and microwave transmission capacity, cable competition becomes fiercer. Basic service rate regulation will hamper the ability of the cable operator to compete equally in the video marketplace.

Supporters of rate regulation indicate that such authority allows better control over consumer rights and customer service. However, rate regulation in Arizona has not proven to make a substantial difference in basic rates charged. Out of 66 systems in Arizona, only 15 have rate regulation. The difference in the average basic rate charged by the regulated systems v. non-regulated systems is approximately $.20 per month. In Arizona, it appears the marketplace concept is indeed doing its job. Cable television is a competitive service and should, therefore, be treated as such and not be hampered with unnecessary rate regulation that will cause interference in the marketplace.

Finally, we are concerned that S.B. 2172 fails to continue the authority of the Federal Communications Commission to regulate the rates, terms and conditions of pole attachment agreements between cable television and public utilities. We believe that this is a necessary function of the FCC in order to maintain fairness and equity among all the parties concerned in pole attachment agreements. We encourage you to consider the inclusion of an extension of the FCC's existing authority in this area.

Arizona operators are not unique in their needs or problems. Our concerns are shared nationwide. On behalf of my fellow operators in Arizona, I urge you to consider my views in the area of municipal ownership, rate regulation and pole attachment fee jurisdiction as you continue your deliberations on S.B. 2172.

ADDENDUM 1

SECTION 47: PURCHASE OF CATV SYSTEM BY CITY

A. Right to purchase. In the event the Licensee forfeits or the City terminates its license pursuant to provisions of this Ordinance, or at the normal expiration of the license term (preceded by at least one year's notice), the City shall have the right, directly or as an intermediary, to purchase the licensed CATV system.

B. Purchase upon termination of the license. If the license is terminated prior the date of expiration, the City may purchase the CATV system for the book value of the tangible assets of the system. Book value shall mean the original cost of tangible property less accumulated depreciation. Book value shall not include any value assigned to either the license itself, the License Agreement, or any right, privilege, or expectancy arising out of the privilege to transact business under the license and the License Agreement, nor shall any value be assigned to goodwill or the value of the Licensee as a going concern.

C. Purchase upon expiration of the license. In the event the City decides not to renew the license, the City shall have the right to purchase the system, considering both the replacement cost and the going-concern value of the system.

1. Replacement cost is the cost of building a new system, using the latest technology and current costs, minus an allowance for the age and condition of the present system.

2. Going-concern value shall mean the benefits that attach to the business as a result of its location in the City, Licensee's reputation among subscribers or potential subscribers for dependability and quality of service. and any other circumstances resulting in probable retention of old subscribers or acquisition of new subscribers; except no value shall be assigned to either the license itself or any increase in value arising out of any expectation of cable system revenues beyond the expiration date of the license.

ADDENDUM 2

The definition of fair value of asets as suggested by the American Institute of Certified Public Accountants of Professional Standards, Volume 3, Paragaraph AC, Subsection 5363.013:

"The fair value of the asset is the amount the seller could expect to receive in a current sale between a willing seller and a willing buyer other than in a forced sale or liquidation. Fair value shall be measured by the market value of an active market value or the asset. If no active market exists, but a similar market exists, such market price shall be used as a guideline in setting the value of the asset."

Senator GOLDWATER. Thank you very much, Jim.

Mr. Swett, should there be any rate regulation of pay cable services?

Mr. SWETT. I think it has been said earlier, and Tom brought out this chart, that there certainly is adequate competition in this area from many different sources. We think any rate regulation would put cable at a distinct disadvantage in the marketplace.

Senator GOLDWATER. Mr. Steele, why do you think the city should have the right to regulate subscriber rates for basic service? If your city currently regulates rates, how has that served the public interest?

Mr. STEELE. Well, my little city does not currently regulate individual rates for basic service. We have an overview capacity, however. I think it is appropriate for the city council to be able to take complaints from its citizens and investigate whether or not there has been abuse.

I do not believe that municipalities ought to regulate pay-channel rates, either. I think that is indeed something that should be taken care of by competition. But these basic services ought to be part of the package, and if this is what we are going to give our citizens I think that the city itself has to be in control of how much its citizens are going to be charged for things like local access.

Senator GOLDWATER. That would have to be by council action, would it not?

Mr. STEELE. Well, first of all, it has taken place usually in negotiations on the franchise itself. The agreement is made with the franchise operator and re-ups and rate changes should come under the review of the council.

Senator GOLDWATER. I think you will find that our bill gives you that power.

Mr. STEELE. My complaint with rate regulation is that I believe the bill says that "no other Federal or State instrumentality or agency or any political subdivision thereof shall make or establish rules or policies regarding the matters dealt with in this title." This means the cities would be cut off from any say in the franchise fees.

Senator GOLDWATER. Well, we will take a look at that, because I thought we took care——

Mr. STEELE. Section 603: One, two, and three we had a problem with.

Senator GOLDWATER. Did you have a question, Mr. Kearse?

Mr. KEARSE. I had a comment on the question of rates, if it is all right.

Senator GOLDWATER. Yes.

Mr. KEARSE. I think under your bill basic services are left up to the company for definition. So if a company defined basic service as bringing in, say, one channel, everything else was paid, then obviously there would be great flexibility and in effect there would be no rate regulation.

Additionally, in our State, for example, right now we are experiencing passthroughs of franchise fees being attached to the pay tiers, as they are called, so that in effect the taxpayers are—the subscribers are paying an extra tax that they should not otherwise be paying.

I would like to make one other comment about competition. For most of America, this competition we have been hearing about this morning does not yet exist and perhaps never will. It is true there is MDS, there is the potential of satellite broadcast, and there is some STV in larger cities. And even in those larger cities, it is cream skimming.

For the average person, they do not have the opportunity to decide whether they are going to watch 35 channels or 20 channels of television. You either take it off the air, and perhaps poorly, or you take it from the cable company.

Senator **Goldwater**. Would you have any recommendation right off the bat on that?

Mr. **Kearse**. With reference to basic services?

Senator **Goldwater**. Yes.

Mr. **Kearse**. I think they ought to be better defined. I think we ought not to leave the definition simply up to the cable company. I think we ought to be very alert to the real nature of competition, and hence a reason to deregulate in the State—rather, in this country. When one realizes that most of the municipalities in this country are really dealing with a monopolist in terms of the cable company, then to deregulate really means that they are going to have the opportunity to accumulate monopoly profits.

Senator **Goldwater**. How would you define the retransmission of the broadcast signals and whatever else cable might carry?

Mr. **Kearse**. I am not sure that I understand. That is how I would define what cable carries.

Senator **Goldwater**. That is what it is now. But you think it ought to be something else?

Mr. **Steele**. Basic services can include more than just the retransmission of a distant broadcast signal. Local origination is something we are looking at in public access. There is an infrastructure of entertainment that this medium provides. There is an infrastructure for profit, but there is an infrastructure for service that we are looking at.

The direct satellite communication we are talking about would not be able to handle interactive services. Local government, local educational facilities will not be able to use these services. Hard-wired cable services can.

Mr. **Kearse**. You see, this is really the issue here, whether you are talking about a one-way entertainment system, in which event I would suggest to you that the Government has very little role in it at all at any level. If you are talking about the future of cable, which is an interactive communications network of the future, which provides basic public services to all of the people, then I think the Government has a very heavy role.

That is where the focus should be today, rather than whether there is competition in the marketplace.

Senator **Goldwater**. Mr. Swett?

Mr. **Swett**. I would like to make several comments. In answer to Mayor Steele, I think you will find that in almost every case that I know public access channels are on the very basic services. It is our idea to get them to the lowest levels. So I do not know of any cable operator that does not put them on that level to make sure that everybody has access.

As far as the future of services go, I think Bob Schmidt commented on those. I think we are doing an R. & D. experiment in a field trial in southern California where we are bringing two-way interactive services to 250 homes, some of them by cable and some of them by telephone. Either medium suits the end result. We are delivering such things as teleshopping, home banking, ticket reservations, airline schedules, and on and on.

How the public or the municipalities could govern that type of new service is beyond me, because right now we do not know the cost of the equipment, we do not know the cost of the data that we will be delivering. And I say here that if we are regulated in these areas the future services will not happen. They certainly will not happen through cable companies.

So I think that would be terribly restrictive.

Mr. **Steele**. I think you will find that where access has been added to basic it is because the RFP that came from the city usually specified that, and because—Mr. Swett mentioned, there is an absence of competition—we find the companies who compete for these franchises do so very vigorously, and they are the ones who increase many of the services.

If memory serves me correctly, the city of Portland only requested 36 channels in total, yet the companies that were competing added channel after channel. So we see where now the city of Portland has over 100 channels that are going to be installed.

Access has been fought for. This bill, if it is passed with this language, would prevent that from happening. The cable operator could come to the city and say, we do not have to put access in basic service. The cable operator will determine that. The city will not determine that. And—well, enough said.

Senator **Goldwater**. Mr. Monroe, the city of Scottsdale passed some legislation just the other day on cable. Would you make me aware of that? The mayor is going to be here tomorrow and I want——

Mr. **Monroe**. The only legislation I am aware of that they have recently adopted, is an enabling ordinance and also they just granted or finalized their license with a cable television company in the city of Scottsdale. To my knowledge that is the only thing they have done recently.

Senator **Goldwater**. One final question. Should the franchising authority be allowed—this is for you, Jim—be allowed to regulate the rates charged for tiers of basic, if the programing and services included in those tiers were determined by negotiation?

Mr. **Monroe**. Senator, in my opinion the municipality should not be controlling the rates in any way, shape, or form. I might point out that when we started in this industry many years ago in the early fifties, very, very few ordinances, licenses, et cetera, had any provision for rate regulation. Then when the Commission adopted its rules in 1972, that was one of the requirements that they mandated. They gave each of the cable companies 5 years to come into compliance.

We went to municipalities and begged them to regulate us because we had to comply with the Commission's rules. A lot of them did not want to do that. That has happened throughout the United States, and now we are back trying to take some of those things back.

And frankly, and certainly in Arizona, the municipalities, there have been many of them that have rescinded that action because the Commission did, in fact, deregulate the requirement.

Senator **GOLDWATER**. Well, gentlemen, I want to thank you on behalf of the committee for coming before us. Please do not hesitate to keep us posted. You are the first day, and I think you are getting some idea that we have got a job ahead of us.

Thank you.

[Whereupon, at 12:04 p.m., the subcommittee was recessed, to reconvene upon the call of the Chair.]

CABLE TELEVISION REGULATION

TUESDAY, APRIL 27, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9 a.m. in room 6226, Dirksen Senate Office Building, Hon. Barry Goldwater (chairman of the subcommittee) presiding.

Senator GOLDWATER. The meeting will come to order.

Our first witness this morning is Hon. Charles Rose III, Congressman from the Seventh District of North Carolina. Welcome. Charlie, you are welcome. Handle it any way you want.

STATEMENT OF HON. CHARLES ROSE III, U.S. REPRESENTATIVE FROM NORTH CAROLINA

Mr. ROSE. Thank you, Mr. Chairman. I will not be very long, but I want to thank you for the privilege of appearing before you today to speak on a subject about which I feel very strongly, that is the right of access of Americans, Mr. Chairman, to television information and entertainment programing.

I am convinced that passage of the proposed section 705 (b) and (e), of the so-called signal privacy provision of S. 2172, will adversely impact that right of free access to television information and entertainment programing so far as it affects satellite Earth station receivers.

Mr. Chairman, I have the honor of being the chair of the Speaker's Advisory Committee on Broadcasting. I also serve as chairman of the Policy Group on Information and Computers, as chairman of the House Recording Studio, and I sit on the House Intelligence Committee and chair the Subcommittee on Oversight and Evaluation.

Through my experience on these bodies, I have become familiar with the state of the art in satellite technology, and I have become personally involved with the direct broadcast satellite transmission system, which today is in place in this country and which is already bringing satellite-transmitted video programing to thousands of Americans who use and utilize home Earth station receivers.

Mr. Chairman, the thing that bothers me the most—and I will speak not from my notes—there is a section in this bill that would make criminals out of people who tune the dials on their Earth station receivers so far as satellite pictures are concerned. There is over the equator of the Earth a parking lot of limited size where satellites can be put in geosynchronous orbit. There are not but so many parking lot spaces up there where you can park a satellite and have the signal reflect all across the United States of America.

Many of the satellites that are up there now are for free programing to the home satellite receiver owner, and you know that in many rural and western parts of this country it is impossible to get television entertainment and information at home unless you have a satellite Earth station.

But many of those satellite programing companies, such as the Christian Broadcasting Network, such as other informational programing, offer that programing free to anybody who has a ground station. Now, there are provisions in this bill that would make it a misdemeanor for you to tune your dial from a free station past one of these so-called pay stations like HBO.

Now, HBO does not want satellite ground station owners receiving their programing. They have refused to even set up a mechanism where people living in a remote area that want to get HBO can pay for it. You recall when—and I am not too old to remember when the cable industry first started. The broadcasters hollered and screamed about piracy: You are taking our signal, the broadcasters said, you are not paying us for it. Well, the cable people came back and said: No, we are just kind of enhancing the distribution of what you put out there in the air.

Well, here we have the shoe on the other foot, Mr. Chairman. The rich kid with its silver spoon in its mouth of the cable TV industry are these pay TV satellite services such as HBO. Now they are taking the other argument, the other argument from what the cable industry took when it first started. And it is saying, that is HBO is saying, you are a pirate, you are a criminal if you pick up our signal which we put unscrambled in your backyard.

Now, Mr. Chairman, HBO refuses to authorize viewing by backyard users. They support the signal piracy provisions of your bill, because they are among the largest owners of cable systems and they want to serve only through cable systems.

They threaten backyard Earth station manufacturers with suits as shown in this attached letter. This bill is going to impose penalties on a 50-year-old statute for the unauthorized viewing in your own home of communications services. Jail terms and fines up to $50,000 for individuals are specified by S. 2172.

The General Counsel of the FCC has recommended that Congress examine the antitrust implications of the refusals to deal with Earth station users. The program suppliers at this point refuse to deal and negotiate. But passage of S. 2172 in its present form would deny program services to millions of Americans.

One other point. The House of Representatives has a TV that we give free to everyone of our House floor proceedings. We take the position that that signal is in the public domain, and just because it is up on a satellite that if you are willing to pay someone for that service, wherever you may be in the country with your satellite base, that you can receive it, not pay Congress but pay the people that run the satellite.

We are in the process now of exchanging correspondence with C-SPAN, the people who are the prime user of our TV House signal, on just that very point. We are not saying that programing they create does not have some stronger property right, but we take the position that taxpayer produced programing, such as the programing of the House of Representatives, is available in the public domain to anybody who wants to receive it regardless of who puts it in your backyard.

Now, the key to my statement is that the parking lot above the equator that services the continental United States of America should be a carefully regulated parking lot and it should be regulated with the many public policy considerations in mind. It should not be the private domain of the motion picture industry and we should not make criminals out of people who gain access to that service.

The manufacture of Earth stations is one of the only U.S.-dominated consumer electronics industries in the world. It is spurring the revitalization of the electronics industry. The manufacturers enrich the lives of millions.

There is literally about 100,000-plus people in America today who rely on satellite ground stations, privately owned, for receipt of programing and entertainment. And there are areas in the Western part of this country, Mr. Chairman, that you know will probably never be wired with cable. And if we make criminals out of those people for access to programing, then I say we should provide a reasonable way for them to get, I think we would be making a serious mistake.

I appreciate you allowing me to come and I wish you well with further consideration of S. 2172.

Senator **Goldwater**. I hope you are wrong, because I might become a criminal. I am building a dish to put in my backyard.

But this, as you know, has caused a lot of problems. We may have a bill over here before the Judiciary Committee to make a judgment on this. In fact, I can recall the music people—I forget the exact name, but they have been complaining about using old copyrighted music on radio as long as I can remember. And then they went into television and now the movie companies are in television.

And we have this bill. I know you tried to amend the copyright bill to take care of this. But I think I can tell you that this probably will not happen. I am not a lawyer, but it is my opinion that once we send the signal 22,000 miles up in the air it belongs to anybody who wants to play with it.

Now, there would be probably some copyright matters that enter into it, but I do not think that that would be objectionable to you. This is going to receive a lot of attention.

I want to tell you what I have told the others. This is just our first go. We do not know too much about cable. I do not think anybody does except those who run it. But we will keep your testimony in mind, and I would hope that we can get something that will be satisfactory, because as you say there are many places out in the West that cannot even lay a cable. It is pretty rough out there.

Mr. **Rose**. I appreciate your comment. If I can say one thing in closing, if you are going to buy or put together your own backyard satellite, I think you are going to find that we are on exactly the same wavelength as to our positions. And I am very proud to find that out, because as you build that station and then get it in place you will be concerned about where you can get programing. And if you discover that to watch a movie channel would subject you to criminal penalties and fines and jail, I think I would be upset if I discovered that, even if I was willing to pay a reasonable fee for receiving it.

Thank you, Mr. Chairman.

Senator Goldwater. The only problem I have is convincing my wife that that big old dish is not going to hurt the scenery.

Mr. Rose. I understand, sir.

[The statement follows:]

Statement of Hon. Charles Rose III, U.S. Representative From North Carolina

Good morning. Thank you for the privilege of appearing before you today to speak on a subject about which I feel very strongly—the right-of-access of Americans to television information and entertainment programming. I am convinced that passage of the proposed Section 705(b)–(e), the so-called "Signal Piracy" provision, will adversely impact that right so far as it affects satellite earth station receivers.

I have the honor of being the Chairman of the Speaker of the House's Ad Hoc Advisory Committee on Broadcasting and Chairman of the Policy Group on Information and Computers. I also sit on the House Intelligence Committee and am Chairman of its Subcommittee on Oversight and Evaluation. Through my experience on these bodies, I have become familiar with the state of the art in satellite technology. I, personally, have become involved with the direct broadcast satellite transmission system which today is in place in this country and which is already bringing satellite transmitted video programming to thousands of Americans who utilize home earth station receivers.

Home earth stations allow Americans in rural and remote areas the same program viewing opportunities available to Americans dwelling in more populated areas which are served by cable systems. There are also urban and suburban areas which are unserved by franchised cable systems. Again, satellite earth stations are already bringing to these areas viewing opportunities which were unimaginable a decade ago. Also, in those urban and suburban areas which are served by cable systems, home earth stations provide healthy competition. All this is to say that home earth stations provide a tremendous benefit to Americans everywhere—whether they reside in remote, rural, suburban or urban areas.

There is a tremendous variety of programming services which can be received by a home earth station. Some of these programs are free, and some of them are subscription services. If these services use the airwaves and if they make a profit off of the use of the airwaves—if they distribute their profitable entertainment product through the airwaves in such a manner that I can receive it in my backyard with an earth station—then it should be mine to watch. Many satellite services welcome viewing of their programming by individual earth station owners. However, the motion picture companies, as well as HBO and the other subscription services, have threatened to sue owners and distributors of backyard satellite dishes.

I do not believe the motion picture companies or HBO should think that they can dictate who can and cannot watch something which they are making a profit on by utilizing scarce public spectrum. This spectrum should be used to benefit the entire nation.

The penalty provisions contained in Sec. 705(b)–(e) brings this issue to the forefront by threatening to make criminals of those who use earth stations to watch subscription services in the privacy of their own home. These penalties are intended to put teeth into existing Section 605 of the Communications Act, a law which the FCC has declared applicable to prevent the "unauthorized" reception of existing satellite communications. The association which represents the owners and manufacturers of satellite earth stations—The Society for Private and Commercial Earth Stations (SPACE)—has made a written offer to all the program suppliers to pay for the right to view satellite subscription programming. Numerous individuals have offered to pay the subscription services for the "privilege" of watching their programming. And what has the response been? The subscription services refuse the payments of individual earth station users, they refuse to negotiate and refuse to discuss the implementation of a mechanism to collect fees for earth station users. They refuse to accept any kind of licensing provisions.

There is a very limited "parking lot" in the sky consisting of the geosynchronous orbital slots. Those satellite channels providing entertainment services to cable subscribers also transmit those same services into the backyards of individuals who may not be fortunate enough to be served by cable. It does not make any sense for Congress to make criminals of these individuals for watching these signals.

The major subscription programming services which have refused to deal with the earth station industry are the same companies which own some of the largest cable companies in the country. They refuse to deal with an industry which competes with cable—if you have an earth station you do not need cable. Yet, these subscription services use airwaves—public resources—scarce resources to transmit their programming and to make a profit. A very small number of companies control a bottleneck for the distribution of prime subscription video programming. Passage of the so called "Signal Piracy" provisions of S. 2172 would sanction their anticompetitive behavior.

Finally, I note also that a prime proponent of the House version of this legislation, HBO, has at long last decided to electronically scramble its signal to ensure payment. Scrambling to ensure payment is a legitimate act of economic self protection; scrambling to deny entertainment services, thus denying them to those Americans who are willing to pay for them—and who have, in fact, already funded their means of distribution—is not.

Again, I thank you for the privilege and opportunity you have extended to me to address this issue of concern.

Attachment.

HOME BOX OFFICE, INC.,
New York, N.Y., August 13, 1980.

Home Satellite Television System,
Division of Rieco TV Service, Inc.,
Tulsa, Okla.

GENTLEMEN: It has recently come to our attention that you are advertising and selling equipment which may be used to receive the programming distributed via satellite by Home Box Office, Inc. ("HBO").

The copyright and exhibition rights in the programs transmitted by HBO are owned by HBO or by program suppliers who license the required rights to HBO. The rights in these programs are protected under the laws of the United States.

We wish to advise you that under the Copyright Act of 1976, the copying and exhibition of copyrighted program materials may subject the infringer to statutory damages up to $10,000, and in cases where the infringement was commited willfully up to $50,000. Furthermore, any person who willfully infringes a copyright in a motion picture for commercial advantage or private financial gain may be fined up to $25,000 and imprisoned for not more than one year. Such person shall also be liable for the attorneys' fees of the prevailing party. We also wish to advise you that any person who has materially aided or caused another to commit an infringement will be liable as a related defendant or as an infringer himself, subject to all of the above penalties.

It is furthermore in violation of Section 605 of the Federal Communications Act for a person to receive or assist in receiving private satellite signals and to publish or divulge the contents of those signals to unauthorized persons. Violators of Section 605 are subject to, interalia, criminal penalties.

In addition to the foregoing, there are a number of other rights and remedies available to us under various federal and state laws.

Accordingly, demand is hereby made that you immediately cease and desist the advertising and sale of any equipment which permits the unauthorized reception of HBO programming in violation of the aforementioned laws. Please be advised that unless we receive written or telegraphic notification from you within ten (10) calendar days that you will comply with the terms of this letter, HBO is prepared to avail itself of its legal rights and remedies.

Nothing in this letter is intended to constitute a waiver of any rights or remedies that HBO may possess in connection with this matter.

Very truly yours,

ETHAN J. PODELL.

Senator GOLDWATER. Our first witnesses today will be: Gustave Hauser, the cochairman, Warner Amex Cable Communications; Hon. Herbert Drinkwater—I recall that name; he happens to be the mayor of my home town, but I will not pay any attention to that—Mr. Gregory Blow, chairman-elect, Independent Operators Board, Ajo Television Service, Ajo, Ariz.; and Mr. Brian P. Lamb, president of C-SPAN.

Gentlemen, you can take your places. I would like to explain these lights up here. Because we are limited—particularly today we have a cloture vote occurring at 11 o'clock—we limit each one of your statements to 5 minutes. So we will put your entire statement in the record and you can brief it any way you want. We are not hard-boiled about the 5 minutes, but after 10 minutes we get rough.

So the first one will be Mr. Hauser.

STATEMENTS OF GUSTAVE HAUSER, COCHAIRMAN, WARNER AMEX CABLE COMMUNICATIONS; HON. HERBERT DRINKWATER, MAYOR, CITY OF SCOTTSDALE, ARIZ.; GREGORY B. BLOW, CHAIRMAN-ELECT, INDEPENDENT OPERATORS BOARD, AJO TELEVISION SERVICE CO., INC.; AND BRIAN P. LAMB, PRESIDENT, C-SPAN

Mr. Hauser. Good morning, Mr. Chairman. My name is Gustave Hauser. I am the chairman and chief executive officer of Warner Amex Cable Communication, which is a joint venture of Warner Communications and American Express.

We are one of the Nation's major cable operators serving nearly 1 million subscribers, and the originators of such cable service innovation as Qube interactive services, Nickelodeon, the children's satellite program channel, and Music Television, the music video satellite network.

I wish this morning to direct my comments particularly to the access provisions of S. 2172. I would also be pleased, Mr. Chairman, to discuss our company's interactive services and our voluntary privacy code, in answer to any questions you may have.

First, Mr. Chairman, I would like to point out that cable is a very vital force today in our troubled economy. We are investing very large amounts of risk capital and creating thousands of new jobs throughout the United States. It is important that legislation concerning cable recognize that it provides highly competitive services, is not a monopoly, and must not be burdened with requirements not equally imposed on its competition. Failure to recognize these realities could chill the investment climate and reverse the situation permitting us to create a world leadership in broadband communications and related communications services.

I submit to you that no real access problem has been demonstrated. Reasonable requests for access have not gone unfulfilled. The cable industry has voluntarily made access abundantly available, and everywhere capacity devoted exclusively to such purposes lies unused.

The approach of the bill to appropriate our expensive and limited capacity by an arbitrary formula is not, in my opinion, in the public interest, and it interferes with our ability to serve our hard-won customers. It is also a burden our competition does not bear.

The business reality, Mr. Chairman, is that the capacity of any cable system must have limits. We need this capacity to attract paying customers to our service. Without them, access has no meaning. No one wants our wires; they want our customers.

Today we seem to be able to attract 50 percent of the homes passed by cable. No one knows, Mr. Chairman, how many channels we must program to attract, say, 75 percent, perhaps 90 percent. We just do not know.

Yet, on an uncoordinated basis our channel capacity is being appropriated for purposes decided by regulators, not customers. In effect, uncoordinated channel preferences are being granted in various ways and in various forums. For example, the FCC requires that we devote 16 or more channels to must-carry commercial broadcast signals. This is also the subject of copyright legislation. Innovative satellite program networks receive no such preferences.

Municipalities want us to set-aside extensive public and commercial access channels. Attempts by legislation to reflect this desire are in the bill. State regulation may conflict with local, and none of this is coordinated with the FCC or the proposed Federal legislation.

When all these preferences are added up, Mr. Chairman, the capacity left for the cable operator to serve customers could be a minority of channels and inadequate as a business matter. Suppose commercial broadcasters were required to dedicate 4 or 5 hours a day to public or commercial access? Suppose newspapers were required to dedicate 18 of 54 pages to such purposes? I think both would claim a violation of their first amendment rights, and cable operators, I wish to point out, have similar first amendment rights as video publishers. The bill may well interfere with such rights.

I want to assure you that we are voluntarily committed to the concept of reasonable public access and we are providing adequate capacity. The cable industry is very proud of its achievements in this area and we believe the cities have not had any real problem in arranging reasonable public access.

But because channel capacity dedicated but not utilized for public access needlessly deprives consumers of the opportunity to obtain other programing, we believe the Federal Government should preempt this subject and address itself to providing a reasonable and realistic ceiling on the cable capacity which can be requested. This policy must take into account the realities of all the requirements being imposed on cable operators, as well as technical and econmic considerations.

We also oppose as unjustified any mandated commercial access requirements. We request that Federal preemption be put in place to assure that such requirements will not be levied at any level of government. No problem or need has actually been demonstrated, nor is any likely to occur in view of the growth of competitive electronic systems—DPS, STV, MATV, disc, cassette low power TV.

We are arranging for commercial access as a business matter in negotiations between cable operators and others.

In closing, Mr. Chairman, I want to point out that cable operators have historically programed their channels out of a necessity to insure the availability of a well conceived and changing package of services adequate to attract and retain subscribers. Such a responsive package does not occur spontaneously in nature. Without it, our business would fail and the investments I spoke of would cease.

The marketplace to which we are all dedicated works best when customers, not regulators, select the services to be offered.

Thank you.

[The statement follows:]

STATEMENT OF GUSTAVE M. HAUSER, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, WARNER AMEX CABLE COMMUNICATIONS, INC.

Good morning, Mr. Chairman and members of the Committee. My name is Gustave M. Hauser. I am Chairman and Chief Executive Officer of Warner Amex Cable Communications, a joint venture of Warner Communications, Inc. and the American Express Company. Warner Amex is a major operator of cable television systems serving nearly 1 million subscribers, and the originator of such cable industry innovations as QUBE interactive services, Nickelodeon, the young people's satellite programming network, and Music Television, the satellite video music network.

I wish this morning to direct my oral remarks to those sections of S. 2172 concerning access to cable systems.

I would also be pleased to discuss our company's QUBE interactive services and its voluntary privacy code, in answer to any questions the Committee may have.

Mr. Chairman, the great progress of the cable industry is directly related to its substantial deregulation and to its freedom to respond to a marketplace which, by constant innovation and service, our industry has created.

Today, we are a vital force in a troubled economy. We are investing large sums of private risk capital and creating thousands of new jobs throughout the United States.

It is important that any legislation concerning cable television be solidly based upon a recognition that cable television provides highly competitive services, is not in any way a monopoly, and must not be burdened with special requirements that are not equally imposed upon its competition. Failure to recognize the realities of our business could result in the enactment of premature solutions for hypothetical problems or arbitrary compromises with the desires of various interest groups. This could chill the favorable atmosphere for private investment which has enabled us to achieve a position of worldwide leadership in broadband communications and related new consumer services.

Our industry has witnessed dramatic changes in the last five years. The next five years may be even more revolutionary. I ask only that we not be legislatively frozen into a mold; that we remain free to innovate and to develop new services; and that your much needed Federal legislation be limited to assuring, by preemption, a uniform and nationwide business structure. Specific legislation should only address actual, demonstrated problems. Legislation, such as the access provisions of S. 2172, which seeks to anticipate theoretical perils could well result in paralyzing our growth.

S. 2172, as drafted, provides a somewhat arbitrary solution to a perceived problem of access to cable systems by third parties, whether for profit or non-profit purposes.

I submit to you that no real problem has been demonstrated. The demand for access has not gone unfulfilled. The cable industry has voluntarily made access abundantly available, and everywhere capacity devoted exclusively to such purposes lies unused, despite competing demands for channel usage.

Yet we are being required, at great expense, to construct system capacity for hypothetical access requirements, a burden our competition does not bear.

I submit that the approach of S. 2172 to arbitrarily appropriate our expensive and limited channel capacity to as yet unknown uses, is not in the public interest and interferes with our ability to serve and retain our hard-won customers.

The business reality is that the capacity of any cable system must have limits. And each channel has a cost to construct and to maintain. We need this capacity to offer programming to attract paying subscribers to our service. Without them, access has no meaning. Today, we seem able to attract 50 percent of homes passed by our cable in major markets. No one knows how many channels we must program to attract, say, 75 percent or even 90 percent.

Yet, on an uncoordinated basis our channel capacity is being appropriated for purposes decided by regulators, not customers. In effect, uncoordinated regulatory channel preferences are being granted, in various ways and in various forums.

For example, the FCC requires that we devote an average of 10 and as many as 16-20 channels to "must-carry" commercial broadcast signals. This is also the subject of proposed copyright legislation. Yet, new innovative satellite program networks have no such preference, and are therefore at a disadvantage. The social benefit of this policy is certainly questionable.

FCC rules eliminate the use of certain channels to protect others from interference.

Municipalities want us to provide extensive Public, Educational and Government access, and to set aside capacity for theoretical third party commercial uses. S. 2172 attempts by legislation to reflect this desire, normally implemented through franchise agreements.

State regulations with respect to access may conflict with local requirements. And neither are coordinated with FCC or proposed Federal legislative impositions.

When all interest groups have been satisfied and when all these preferences are added up, the capacity left for the cable operator to serve his customers could be a minority of channels and wholly inadequate as a business matter. And none of these requirements in any way reflect a concern for the desires of the paying customer. I know of no analogous situation in American business.

One cannot doubt the response of commercial broadcasters were they to be required to dedicate 4-5 hours per day to non-profit or to commercial access purposes. Suppose newspapers were required to dedicate 18 of 54 pages to such purposes? Both would certainly claim a violation of their First Amendment rights. Cable operators, I wish to point out, have similar First Amendment rights as video publishers, and the access provisions S. 2172, as drafted may well interfere with such rights.

Let me assure you that we are voluntarily committed to the concept of non-profit access and are providing ample capacity to local Government bodies, educational institutions and commodity groups. Access should be equally available to State and Federal government officials, although this has not been specifically sought. The cable industry is proud of its achievements in this area, and believes that cities have not had any real problem in arranging reasonable access to cable systems. Nevertheless, they are now requiring, free of charge, channel capacity far beyond any showing of reasonable need or public purpose.

Because channel capacity dedicated, but not utilized, for public access purposes deprives consumers of the opportunity to obtain other services, we believe the Federal Government should preempt this subject and address itself to providing a reasonable and realistic ceiling on the cable capacity which can be requested for public access.

A Federal policy must take into account and harmonize the totality of requirements being imposed upon the cable investor as well as provide flexibility to accommodate the technical and economic realities of individual cable systems, and the real interests of cable subscribers.

We oppose, as unjustified, any mandated commercial or for-profit access requirements, and request Federal preemption to assure that such requirements will not be levied at any level of Government.

There is no demonstrated problem or need. Nor is any likely to occur in view of the growth alternative and competitive electronic delivery systems. (e.g. multichannel STV, DBS, multichannel MDS, MATV systems, low power etc.)

Cable operators have historically programmed their channels out of a necessity to assure the availability of a well-conceived and changing package of services adequate to attract and retain subscribers. Such a responsive package did not and cannot occur spontaneously. Without it, our business would fail.

And no vertically integrated cable operator originates more than a few of the many program services provided by cable systems. Competitive third party program services are absolutely necessary to cable operators and are today widely carried on virtually all cable systems.

We believe that the public is not served by an access policy which relies on the first-come-first-serve approach of S. 2172. In an atmosphere of limited capacity, first-on may not result in the public obtaining the most advanced, most competitive or appealing programming from time to time.

The marketplace, to which we are all dedicated, works best when customers, not regulators, select the services to be offered. The cable operator with major risk investments at stake, lives or dies by catering as closely as possible to the desires of the cable customer in the marketplace. We ask that S. 2172 reflect this business reality.

PRIVACY

As the company which played a pivotal role in the development of two-way cable communication services (QUBE), Warner Amex shares this Committee's concern for the protection of cable subscribers' privacy, as reflected in S. 2172. Indeed, we have gone to considerable lengths to safeguard our subscribers' privacy at each step along the way in developing our two-way interactive service and technology. The measures taken have included rigorous physical security of computers and records, a written (contractual) commitment to subscribers assuring the confidence of individually identifiable information, and refusal to provide subscriber information to litigants or government agencies. Our self-policing approach has worked: we have never, since 1977, received a single subscriber complaint suggesting breach of privacy.

In 1981, Warner Amex codified its existing privacy procedures and safeguards and adopted the cable industry's first privacy code. The Warner Amex "Code of Privacy" has been favorably received in and out of the cable community and has served as a model for other similar codes, including the privacy code of the New York State Cable Television Association.

We believe that:

(i) Self regulation is demonstrably working to perserve the privacy of cable subscribers.

(ii) Our industry and its services are changing so rapidly that any regulation would be premature and soon obsolete.

(iii) The Bill, particularly section 612(d), is overly broad: it would appear, for example, to preclude the non-threatening disclosure of information to third parties performing essential services, such as the cable operators' independent accountants.

(iv) The Bill's penalty provisions which include daily fines, compensatory and punitive damages, attorney's fees, etc.—deriving as they do from Federal wiretap statutes—are overly severe and are far in excess of the remedies proposed by the U.S. Privacy Commission in its 1977 study.

(v) For the time being, Federal legislation is required merely to preempt, without regulating, the field, to avoid inconsistent and conflicting State and local regulations which would be premature and threaten both the viability of our current business and the full development of future services.

I would be pleased to respond to any questions the Committee may have.

Thank you.

Senator **Goldwater**. Thank you very much. And if you did not complete your full statement, the statement will be put in the record. And that will apply to the others, too.

Our next witness will be Mayor Herbert Drinkwater of the city of Scottsdale.

Mr. **Drinkwater**. Thank you, Senator Goldwater.

My testimony today is given on behalf of the city of Scottsdale, at the invitation of the National League of Cities and the office of Senator Barry Goldwater.

Scottsdale has just been awarded a cable contract after a lot of hard work and citizen involvement. I am proud of this contract and I am proud of our citizens and the high level of participation that they have offered. I am also very excited about the cable system our citizens will enjoy.

This morning I would like to describe for you the impact S. 2172, as presently drafted, would have on our contract and our cable system. Additionally, I am submitting written comments to the committee which express in more detail what I perceive to be both strengths as well as potential problems of S. 2172.

First I would like to congratulate you, Senator, for the work you are doing, because I think the Cable Telecommunications Act of 1982 is an excellent starting point for consideration of a national cable policy. I am firmly of the opinion that a national cable policy is needed. There is too much confusion at present about the respective roles of the Federal, State, and local governments in cable regulation. National cable policy should end such confusion.

Now, what about Scottsdale's role in cable regulation? When we first started to consider cable over 2 years ago, we asked ourselves, does cable TV need regulation? The cable industry told us no, the marketplace would govern. Frankly, because I am not in favor of Government regulation if there is any way to avoid it, I had hoped the industry was correct.

Unfortunately, they were not. Our research showed quite clearly that cable, by its very nature, is a monopoly. Only one cable company should serve a given area. Why? I have three main reasons to offer:

One, because of the extremely high capital cost to build a cable system;

No. 2, because of the substantial disruption to a community caused by cable construction: digging trenches across residents' yards, cutting streets, rearranging utility lines. A community should only be disrupted once;

No. 3 and finally, because of cable's exciting potential as an information utility, including such services as burglary detection, smoke-fire detection, medical alert, opinion polling, data transmission, energy load management, bank and shop at home, and emergency alert override. These services promise to enhance our lifestyle, lower the cost of daily life, and improve the efficiency of both business and Government. But to be effective they should be delivered by a single cable company.

If you realize that cable is a monopoly, then you will agree that Government regulation is required to guard against unreasonably high rates to subscribers and to represent the public interest.

I am also firmly of the opinion that local government is the most appropriate regulatory agency for cable TV. Why? Because cable systems are built on a city-by-city basis. Cable technology is such that the quality of the cable signal deteriorates with distance traveled. So cable systems are necessarily limited in size. Therefore, unlike the telephone system, the cable system is a local communications network. Local regulation allows each community to insure that its particular telecommunications needs and priorities are met.

I would like to talk about Scottsdale. What would S. 2172 do to the 2 years of hard work, thought, planning, and effort of the city of Scottsdale and its citizens have given to cable TV? Frankly, it would require us to throw most of that work away, and that of course concerns me very greatly and concerns our citizens greatly.

Scottsdale has developed a comprehensive regulatory structure for cable. It includes a citizens' commission to make sure that the cable company lives up to its contractual agreement in our community, and a nonprofit corporation to facilitate access by both citizens and institutions. But S. 2172 establishes a preemptive Federal authority for the majority of cable regulatory issues and prohibits local government from dealing with those issues. Thus, large portions of Scottsdale's cable contract would be voided.

For example, we have agreed by contract to set aside 20 percent of system capacity for community access. S. 2172 only allows half that much. I firmly believe that the Federal Government should not be preempting local authority.

The advantage of local authority is that it establishes cable regulation by contract through negotiation and mutual agreement to the benefit of the citizens of that particular community. Local authority provides an opportunity for Americans to do what they do best—to innovate, and to try something different. It is an opportunity for every community to select a cable system and a regulatory structure which best suits that community. National cable policy should encourage this kind of initiative, not stifle it.

Additionally, preemptive Federal authority as outlined in S. 2172 would require significant expenditures of Federal dollars to provide for the active regulation of the cable industry in the more than 6,000 cable systems already in operation. Failure to allocate such money would render the Commission unresponsive, and cable regulation a Federal embarrassment.

What should the national cable policy do? I might suggest that it should address national concerns:

One, establishing guidelines for ownership of this powerful communications media;

Two, establish minimum requirements for community access to the system;

Three, promote the development of nonentertainment services, such as home security, energy load management, and prohibiting the cable operator from monopolizing the cable system for such services;

Four, it is important to protect the privacy and rights of individuals.

I have written comments to the committee addressing each of these four points, but I would like to emphasize what I think is the critical importance of the last point, protection of individual privacy. The cable system will have a direct link into my home. It will be able to accumulate vast amounts of information about my personal life. I would like my personal life and privacy protected, no matter where I live.

S. 2172 addresses the issue of disclosure of information, but I think a more comprehensive treatment covering the collection and storage of such data is essential.

I would like to say, in conclusion, that I believe the Federal Government today is clearly shifting responsibility and resources to State and local authority. I think that is how it should be. Cable regulation should be no exception. Cable TV is a local communications system, franchised locally, and it should be regulated locally. We undertake this responsibility in the firm belief that we, as local representatives of our citizens, best understand the needs and desires of the people we represent.

We think we have a good relationship with our local cable TV company, and we are meeting the local objectives we have set out to meet. I would recommend that national cable policy affirm the validity and importance of the local franchise process and encourage cable regulation by contract, arrived at through negotiation and mutual agreement, on the local level.

It has been an honor to share our citizens' concerns with you, Senator Goldwater. Thank you very much for inviting me.

[The statement follows:]

STATEMENT OF HERBERT R. DRINKWATER, MAYOR, CITY OF SCOTTSDALE, ARIZ.

Mr. Chairman, members of the Senate Subcommittee on Communications: Thank you for the opportunity of addressing Senate Bill 2172, the Cable Telecommunications Act of 1982. I am Herbert Drinkwater, Mayor of the City of Scottsdale, Arizona.

The City of Scottsdale has just completed a two-year cable television franchising process that included extensive community input and involvement, intense competition on the part of the eight cable companies that submitted applications for the Scottsdale franchise, and the expenditure of considerable resources and administrative efforts for the creation of the CATV Regulatory and Administrative structure appropriate to the Scottsdale community.

This process has resulted in a contract between the City of Scottsdale and a cable television company which ensures that both the entertainment and non-entertainment service needs of Scottsdale residents will be met. Senate Bill 2172 will have a significant impact upon that cable contract, and it is, therefore, Scottsdale's desire to submit comments on this proposed legislation.

The City of Scottsdale looks upon Senate Bill 2172 as a generally positive legislative effort, and an excellent starting point for consideration of a National Cable Policy. Such a policy will, in the final analysis, need to balance the interests of private enterprise against the public interest components of cable television technology. That kind of balance is represented in Scottsdale's cable contract, arrived at through negotiation and mutual agreement.

My testimony today will focus on three major objectives:

(A) To outline Scottsdale's goals with regard to cable regulation;

(B) To set forth what the City of Scottsdale perceives to be a proper federal role for cable regulation; and

(C) To set forth what Scottsdale perceives to be the strengths as well as potential problems of Senate Bill 2172 as presently drafted.

A. THE SCOTTSDALE APPROACH

There are six primary goals of Scottsdale's cable television regulatory efforts:

(1) To ensure that all residents have an equal opportunity to subscribe to cable services at reasonable and nondiscriminatory rates.

(2) To ensure that both residents and institutions have access to the cable system for the purpose of improved communications to the community. In other words, to ensure that channel capacity, studio facilities, video equipment and training are provided to the Scottsdale community.

(3) To protect the rights of privacy of the individual.

(4) To ensure that the cable system is designed and constructed with a maximum of technical flexibility, in order to take advantage of technological improvements as they occur.

(5) To encourage the development of non-entertainment services (for example: energy load management; home security; data transmission).

(6) To ensure that some portion of system capacity be available by lease for use and control by other than the cable company. For example: a business might lease channel capacity for data transmission; a security company might lease channel capacity to offer a competing security service to that offered by the cable company; the city might lease channel capacity for transmission of traffic signal intertie data; etc.

In short, Scottsdale's goal is the construction of an integrated community communications system that will offer both vastly improved entertainment options, as well as a variety of non-entertainment services, to residents and institutions.

It is Scottsdale's position that the exciting future of cable television, and the rational behind the City's active regulatory involvement in this technology, lies in cable's potential as an information utility. That is, cable's potential to deliver services which will enhance our lifestyle, lower the cost of daily life, and improve the efficiency of both business and government.

Scottsdale is convinced that local government is the most appropriate regulatory agency for cable television. Cable systems are constructed on city-by-city basis, and local regulation ensures that individual community needs and priorities are properly reflected.

B. A NATIONAL CABLE POLICY

Nevertheless, there is also a need for a national cable policy to address those issues which are of national concern, as follows:

(1) *Protection of individual privacy.*—Perhaps most importantly, a National Cable Policy should set forth comprehensive and specific guidelines with respect to the accumulation, storage and use of the vast amounts of personal information the cable operator will have available.

(2) *Ownership policies.*—In order to ensure competition between telecommunications service providers, and in order to prevent a concentration of media ownership, the federal government has traditionally established national ownership policies for the electronic media and telecommunication services. Senate bill 2172 prohibits na-

tional ownership guidelines. I suggest that this provision is not in public interest, particularly in light of the trend for small cable companies to be acquired by larger, "multiple system operators" (MSO's), and for MSO's to be acquired by even larger corporations (for example, the purchase of Teleprompter by Westinghouse).

(3) *Access Policies.*—It is important that all Americans have an assurance of access to the cable communications system. There is more than sufficient capacity to allow for the expression of a wide diversity of viewpoints. Senate bill 2172 requires that 10 percent of system capacity be set aside for community access.

However, it is not clear whether this is a minimum or maximum requirement. For some communities, 10 percent may be more that enough capacity to provide for their local communications needs, while for other communities 10 percent may not allow all such needs to be met. I therefore recommend that Senate bill 2172 be amended to establish a national minimum allocation of system capacity for community access, which may well be exceeded in some communities as a part of the normal franchising process.

(4) *Interactive and non-entertainment services.*—The importance of cable, and its potential as an "information utility", lies not in its entertainment programing, but rather in its promise of interactive and telecommunications services, including: opinion polling; shop-at-home; bank-at-home; date transmission; energy load management; text retrieval; security services.

It is, I think, of national concern that the cable operator not be permitted to monopolize channel capacity for the introduction and delivery of such services. Such services will become increasingly essential to individual daily life, and potential providers of such services should be able to lease a portion of cable system capacity for the delivery of such services, even in competition with the cable operator.

C. SPECIFIC COMMENTS REGARDING SENATE BILL 2172

Finally, I would like to address some specific sections of S. 2172.

Perhaps most importantly, S. 2172 should not establish a pre-emptive federal authority for the majority of cable regulatory issues and exclude local government for dealing with those issues. Rather, a national cable policy should focus on issues of national concern, and affirm the validity and importance of the local franchising process and the pursuit of cable regulation by contract, arrived at through neogitiation and mutual agreement.

A National Cable Policy should affirm the right-of-contract between the City and its cable company. Specifically, because most contracts contain a severability clause, should federal law retain a pre-emptive federal authority, major portions of most cable contract would be negated, while the cable company would still retain the contractual right to the local cable franchise. This would create a severe imbalance in the carefully drawn contractual arrangements that were arrived at and agreed to by both the municipality and the cable company.

Specifically, S. 2172—as presently drafted—would nullify major portions of Scottsdale's cable contract. For example, our contract provisions include:

(1) Twenty percent of system capacity dedicated to community programing, including 9 percent reserved for City government use. It is Scottsdale's intention to use City capacity, not only to communicate with residents, but for water telemetry, data transmission, traffic signal intertie, a building-to-building link for a City-owned telephone system, and such other uses as needed.

(2) Creation of a community non-profit corporation to facilitate access.

(3) Basic services offered over 3 tiers of service.

(4) A buy-back clause at fair market value, but not to include the value of the franchise freely given by the City to the cable company.

These provisions, and many others, would be nullified unless S. 2172 is amended to recognize the City's right-of-contract.

Again, it is recommended that Federal Cable Policy affirm the validity of the local franchise process and contracts arrived at through negotiation and mutual agreement.

Secondly, S. 2172 addresses the subject of rate regulation, and allows local rate regulation for basic service and for community access channels. However, S. 2172 defines basic service as "the retransmission of broadcast signals and any other service as determined by a cable operator." This provision essentially allows the cable operator to decide how much of total system programming shall be subject to rate regulation.

Given that the local government grants a jurisdictional monopoly to a cable company, and given that the services of that cable company will become increasingly essential to individual daily life, then the demand for such services will become increasingly inelastic, and government has an obligation to provide rate regulation as an alternative to marketplace competition.

It makes little sense to only regulate a part of the total rate structure. The basis of rate regulation is a reasonable rate of return based upon total revenues, and the regulatory agency should have—in fact, needs—the authority to regulate all rates.

A National Cable Policy should, therefore, recognize the natural monopoly characteristics of cable service, and affirm the importance of rate regulation—total, not partial—to protect the interests of the individual subscriber.

CONCLUSION

Local cable regulation provides an opportunity for local initiative and innovation, and an opportunity for each community to develop a local telecommunications network which best meets that community's needs and goals.

A National Cable Policy should promote such initiative.

A National Cable Policy should focus on issues of national concern. Specifically:

(1) Protection of individual privacy;
(2) Ownership guidelines;
(3) Right of access to the cable system;
(4) Promotion of interactive and non-entertainment services.

A National Cable Policy should not establish preemptive federal authority. Rather, such policy should affirm the importance of the local franchising process, and the validity of regulation by contract, arrived at through negotiation and mutual agreement.

Senator **Goldwater**. Thank you very much, Mr. Mayor.

We will now hear from Mr. Gregory Blow. I might say, we selected him because I cannot think of a town in the United States that is more isolated than Ajo. It means "garlic," and it is the site of one of the largest copper mines in the world, only a few miles north of the Mexican border and about 50 miles from the nearest town.

So go right ahead, Gregory, and give us your problems.

Mr. **Blow**. Thank you, Mr. Chairman.

I am president and owner of the Ajo Television Service Co., the first cable system in Arizona built in 1952, an independently owned system serving approximately 2,000 subscribers in Ajo and Gila Bend, Ariz. I speak today on behalf of the Independent Operators Board of the National Cable Television Association, which represents the interests of the independently owned member systems of the NCTA, averaging less than 5,000 subscribers per system. We wish to comment on the following sections of your bill.

SECTION 607—RATES

There never has been shown a need for rate regulation. My system and many others I represent are classic systems. We brought signals to areas like Winslow, Ajo, Prescott, when these areas were deemed never to be able to receive television. If cable television was ever considered to be a monopoly, perhaps this was the time.

Yet, even in the 1950's and the 1960's we felt the competition of the marketplace, because for over 15 years we never changed our rates and only did so when inflation made it impossible to ignore what it was doing to our monetary policy. If you do not agree with us, then we propose that rate regulation only apply to areas that only have less than three channels of television, and have less than two channels affiliated with a national network.

It has taken 30 years for cable television to penetrate urban markets because of unfair rules and regulations. The marketplace is fully capable and always has been the most competent judge of setting price and quality of service.

SECTION 611—FRANCHISE FEES

We support the establishment of franchise fee ceilings. However, in order for us not to be unfairly imposed upon, we believe the wording of this section should express that the FCC should establish franchise fee limitations based on actual costs incurred by the licensing authority for allowing a cable company to do business in their jurisdiction. Franchise fee ceilings were finally adopted by the FCC to correct the abuses from the cities, and these abuses would increase today without this authority.

We believe that in no case should the FCC allow more than 3 percent of gross revenues to be set as a maximum limit for franchise fees. We also believe that all free services that a licensing authority may demand, such as free cable service to Government buildings, free equipment for production of Government access programing, trenching fee, should be deducted from the annual franchise fees paid.

Approximately 7 years ago, after 23 years of operation without requiring a franchise, I was forced to obtain a county permit by the FCC. Upon obtaining the permit, the county manager testified that it never cost the county more than $100 a year for my operation. So that became my franchise fee. Four years later because of publicity in the Tucson area, my fee became 3 percent or $11,000 a year, without any other benefits to my subscribers. And we are forbidden to show this fee to our subscribers so they will know how much they are taxed.

SECTION 606—LEASED CHANNELS

The independent operators do not believe mandated access channels is necessary. If it is needed, we will supply it out of good business sense. However, if it is mandated we believe the lease access should be interpreted to mean contract accounts such as HBO. The 10 percent dedicated Government use could be supported as long as this means only one channel has to be provided initially, and that another channel will not have to be made available unless the initial channel has had an 80-percent capacity use for over a period of 6 months.

SECTION 605—GOVERNMENT OWNERSHIP

Cable television is a private enterprise and a communication medium. No Government agency should ever have control over a communication medium or compete against private enterprise. The potential of this ownership is very dangerous to our Nation, and we all know of instances where Government tries to cover up their mistakes and expound their own viewpoints.

If the marketplace does not want to purchase cable service voluntarily from private enterprise, then that same marketplace should not be forced to pay for building the service through private tax dollars.

If cities invest money in cable television, I do not believe that anyone is naive enough to think that they will not try to protect their investment. In order to protect this investment, they could refuse to accept future bids from competing cable television companies or they could try to limit the competition by licensing procedures, taxes, or zoning fees. They could limit or totally exclude the ability of low power television stations, home Earth stations, or MATV systems from offering competition to the municipally owned cable television system.

I believe that with the current level of local government, a government-owned cable system will ultimately lose money and be forced to use already high tax revenues to support their failures. I believe they would use medical emergency arguments to force everybody in this jurisdiction to take the service.

SECTION 616—DISTANT SPORTS

The independent operators believe this section gives too much power to athletic corporations. Professional athletes are already well compensated and should not be further enriched by the misfortune of many Americans who live in towns all over the United States that would be denied distant signals. We believe this provision in the bill could be eliminated.

Thank you very much.

[The statement follows:]

STATEMENT OF GREGORY B. BLOW, CHAIRMAN-ELECT, INDEPENDENT OPERATORS BOARD, NATIONAL CABLE TELEVISION ASSOCIATION

SUMMARY

The independent operators who belong to the National Cable Television Association and are represented by the Independent Operators Board fully support Senator Goldwater's S.B. 2172 in the following areas:

Section 605 (d) and (e)—Telephone Company Ownership
Section 605(b)—Foreign Ownership
Section 610—Elimination of the Fairness Doctrine and Equal Time Rules
Section 605(a)—Drop Restrictions on Cable TV Ownership
Section 705—Piracy of TV Signals

The independent operators wish to comment in opposition on the following items in S.B. 2172:

Section 607—Rates
Section 611—Franchise Fee Ceilings
Section 606—Leased Channels
Section 605(3)(c)—Government Ownership
Section 616—Distant Sports Signals

I am President/Owner of Ajo Television Services, an independently run system serving approximately 2,000 subscribers in Ajo and Gila Bend, Arizona. I speak today on behalf of the Independent Operators Board of the National Cable Television Association which represents the interest of the independently owned member systems of NCTA.

SECTION 607—RATES

No government agency should have the right to set or regulate rates over cable television in areas that fall within the Grade B contour of three (3) or more television stations, providing, at least two (2) of these stations are affiliated with the national network. Cable television is a free enterprise system in full competition with movie theaters, local television broadcast stations, video cassette players and will soon be in competition with low-power television stations and direct home satellite networks. A government agency should only be able to regulate rates in communities where people cannot receive any over-the-air television signals.

Cable television has been shackled for many years with unfair rules and regulations which have resulted in the industry taking thirty (30) years to penetrate urban areas. Cable television has too exciting a future and too much promise for creating jobs, entertainment and creative talents to be hampered by the whims of government officials who wish to use cable television for political purposes. The marketplace is fully capable and has always been the most competent judge of setting price and quality of service.

SECTION 611—FRANCHISE FEES

The Independent Operators Board supports the establishment of franchise fee ceilings; however, in order to prevent municipalities, counties or states from using cable television as a source of extra income, we believe the wording of this section should express that the FCC should establish franchise fee limitations based upon actual cost incurred by the licensing authority for allowing a cable company to do business in their jurisdiction.

For thirty (30) years the industry has been aware of government bodies finding excuses to increase their importance, budgets and size. Therefore, we believe that such limitations on franchise fees should be incorporated in S. 2172. We believe that, in no case, should the FCC allow more than 3 percent of gross revenues to be set as the maximum limit on franchise fees. We also believe that all free services that a licensing authority may demand, such as free cable service to government buildings or free equipment for production of government access programming, should be deducted from the annual franchise fees paid. Power companies, telephone companies, radio stations and broadcast and subscription television stations are not required to provide such free services, even if they require use of public rights-of-ways. We believe that cable television should not have to provide such uncompensated services. Cable television pays property taxes, as well as all other taxes incurred by any other business and should not be given any additional monetary burdens by the licensing authority, as such additional costs eventually reflect upon subscriber rates.

Approximately seven (7) years ago, after thirty (30) years of operation, I was forced to obtain a cable television license by the city of Ajo. Previous to that, I had been operating under a Pima County license. The city tried to determine what they should charge for a license fee. They inquired with the County what it had cost the County to regulate my system for the past 23 years. The County Manager responded to the city that it had not cost them more than $100 per year. However, because the nearby large city of Tucson set up a very hefty franschise fee process, the city of Ajo decided that it would cost me $900 per month to hold a cable television license. This means I pay approximately $11,000 per year in license fees, and with that same $11,000, I could hire another lineman which would better my service capability to my subscribers in my community.

SECTION 606—LEASED CHANNELS

The Independent Operators Board supports the concept of dedicating 10 percent of their channels for leased access, as long as this is interpreted to include any pay service that we contract out for, i.e. Home Box Office or Showtime. The Independent Operators Board also supports dedication of 10 percent of their channels for government use, as long as this means that only one (1) channel has to be provided initially and that another channel will not have to be made available unless the initial channel has had an 80 percent capacity use for over a period of six (6) months.

Cable operators all over America have made origination channels available only to have them go unused. In light of the cost to the operator of having these dedicated channels, we believe that government use should be demonstrated. It is important to note that several channels of a small system are potentially inaccessible to operators, due to reserved military and emergency frequencies. Therefore, it is important that all possible channels of a small system be used in order to maximize subscriber service.

SECTION 605(3)(C)—GOVERNMENT OWNERSHIP

Under no circumstances, should a government agency be allowed to own cable television. Cable TV is a private enterprise and no government agency should ever be allowed to compete against private enterprise. Cable television uses a communications medium for selling entertainment and we believe no government agency, city or otherwise, should ever have control over a communications medium that reaches the people. The potential of this ownership is very dangerous to our nation.

We have all had experience with government trying to cover up mistakes and expound their own viewpoints. Government is the last entity that citizens would want owning or controlling such an important communications medium. The Senate of the United States should do all in its power to prohibit this from occurring. If the marketplace does not want to purchase cable service voluntarily from private enterprise, then that same marketplace should not be forced to pay for building the service through their tax dollars.

The licensing authority may have the ability to define "fair market value" in their own terms; however, we believe that a definition of the term "fair market value" ought to appear in the legislation if municipal ownership is not to be banned. If cities invest money in cable television, I do not believe that anyone is naive enough to think that they will not try to protect their investment. In order to protect this investment, they could refuse to accept future bids from competing cable television companies or they could try to limit competition by licensing procedures, taxes or zoning. This could limit or totally exclude the ability of low-power television stations, home-earth stations or MATV systems from offering competition to the municipally owned cable television system. I believe that with the current level of local government, a government owned cable system will ultimately lose money and be forced to use already high tax revenues to support their failure.

SECTION 616—DISTANT SPORT SIGNALS

The Independent Operators Board believes that this section of S. 2172 gives too much power to athletic corporations. Professional athletes are already well compensated and should not be further enriched by the misfortune of many Americans who live in towns all over the United States that are too small to have a major league baseball or football team. Under section 616's wide ranging mileage provision, these small town residents that cannot afford to travel to the large metropolitian aras to watch live sporting events will be precluded from seeing that event on cable. The residents of my community, Ajo, Arizona, will be directly precluded from seeing any event that is played in either Phoenix or Tucson. This cable sports programming is a main source of entertainment for my small community and others like it across the country.

In conclusion, I have delineated the specific concerns of independent operators who primarily serve small areas. I urge you to consider the needs of our systems and our subscribers in your future consideration of S. 2172.

Senator **GOLDWATER**. Thank you very much.

And now we will hear from Mr. Brian Lamb, president of C-SPAN.

Mr. **LAMB**. Good morning, Senator Goldwater, Senator Cannon.

I am here not really to testify so much on the bill as on the programing services available to cable television viewers. You might remember, a couple of years ago when we first started you participated in a two-way teleconference down to Atlanta. That was in the early days of C-SPAN's existence.

C-SPAN, to refresh your memory, is a nonprofit private industry cooperative entirely paid for by the cable television industry. In fact, Gus Hauser, here at the table, John Saeman, who's in the room, John Gilliland and Ralph Baruch were all original charter members of C-SPAN, which started in March 1979.

The purpose of this organization was to create a system of television that brought about a rather cataclysmic approach to this medium which we've had around for 30 years. That approach is based on the fact that the American people can make up their own mind about how they want to think about the issues. The way to do that is to provide them with public events here in Washington as they happen, without comment or analysis.

We started in March of 1979 with the floor proceedings from the U.S. House of Representatives, adding to that over the next 3 years things like hearings here in the Senate, also in the House, the National Press Club luncheon speeches, National Governors Conferences. And we continue to use the philosophy that we will give our viewers the chance to make up their own minds. It is that simple. It is no more complicated than that.

At the beginning we used to call it an experiment. The experiment days are over. The only reason the experiment days are over is because the customers of the cable television companies have told them in no uncertain terms and words that they love this opportunity to make up their own minds.

I probably have the best job in television. I do not think in 3 years I have received more than two or three letters complaining about our service. As a matter of fact, when a couple of weeks ago we offered our subscribers the chance to get a calendar, as simple as that may sound—I know Congressmen and Senators offer their constituents calendars—we said, all you have to do is write us and tell us what you think of the service, how it is being used in your community, and let us know who you are and a little bit about your background—within 14 days we had 2,000 requests.

That may not seem a lot in today's television, but this service is not meant for numbers or ratings. It is meant to provide the communities all across the country, some 1,000 and hopefully growing in the years to come, the chance to become involved in what you are doing here.

There is a myth around Washington that people out there do not understand how Government should work and operate. I think we have proved through the volume and intensity of our participants, the viewers, that that is not the case. As a matter of fact, I do not think we have had anyone come on the network, sit down for an hour and respond to questions and comments by our viewers via the telephone, live via satellite, that has not gotten up from the chair and said, "I cannot believe that many people watch, I cannot believe that many people understand these issues, and I cannot believe the intelligence of the questions."

We have never missed, as far as I can remember, from any guest we have had on, where they have had an interesting and exciting experiment in how to create a dialog nationwide instead of right here in Washington.

I want to read you just one brief final comment and I will be glad to respond to questions. This is from a viewer, and I am not kidding you when I tell you this is what the letters say when they come in. This is from Menomonee Falls, Wis.: "One day while switching through the channels I landed on C-SPAN"—and that is more often the case than not. In other words, there is not a tremendous amount of publicity about it in these communities.

> You were showing a meeting of the House of Representatives in progress. It was the most exciting thing I have ever seen on television in 20 years. To be able to see and hear the discussions between our Representatives, that remote body whose decisions directly affect my life—well, the feeling is indescribable.

"The call-in part of the program"—we have a call-in every day following the House sessions or these hearings—"is also very interesting. It gives one a feeling of unity—these 'United' States."

And that is no exaggeration. Any time you want to come look and see for yourself, you are invited.

Thank you.

[The statement follows:]

STATEMENT OF BRIAN P. LAMB, PRESIDENT, CABLE SATELLITE PUBLIC AFFAIRS NETWORK

The Cable Satellite Public Affairs Network, C-SPAN is now in it fourth year of providing new and public affairs television programming to a national cable television audience. My purpose here today is to describe what C-SPAN is, what it does, how it is structured, and how it has been received.

C-SPAN IS A PUBLIC SERVICE OF THE CABLE TELEVISION INDUSTRY

In 1977, twenty-two of the top cable television companies contributed time and money to create C-SPAN as a non-profit, no stock, tax paying cooperative in anticipation of televised U.S. House of Representatives proceedings. The initial investment allowed C-SPAN to acquire the necessary access to the satellite and to develop a network among the country's cable systems for distribution of the House debate to the American people. The result was that on March 19, 1979, C-SPAN delivered Congress to 3.5 million homes. The response of the public was so favorable that when C-SPAN sought additional funding from its founding cable companies to provide in-depth coverage of the 1980 Presidential campaign, the support was swiftly given.

C-SPAN has continued to provide its news and public affairs programming with the support of the cable industry. At the same time, C-SPAN serves as a daily demonstration of the industry's ability to offer alternatives to traditional broadcast programming for smaller, specially interested audiences. The proof of this ability is that today C-SPAN is the *only* television network devoted exclusively to public affairs programming.

C-SPAN PROGRAMMING: A VARIETY OF PUBLIC FORUMS

In response to strong support from both its audience and the cable television industry, C-SPAN has not stopped growing since its inception. At first, C-SPAN's programming was limited to the House debates. When the House was not in session in the first few months of operation, C-SPAN was not on the air. Then C-SPAN added other public affairs programs such as the National Press Club luncheon speaker series, and the Close Up Foundation's series of seminars on current issues aimed at high school students. By the end of 1980 C-SPAN was carrying enough public affairs oriented programming to fill eight hours a day, five days a week.

On February 1 of this year C-SPAN inaugurated a 16-hour programming day—from 9:00 a.m. to 1:00 a.m., seven days a week. The tripling of the hours of our service allowed C-SPAN to reach the large prime time viewing audience. Under the 8-hour weekday format C-SPAN had been available only to those who, for one reason or another, were at home during ordinary business hours. Today, C-SPAN is available to viewers who seek a serious public affairs alternative to the standard network prime time entertainment fare. The ability to cablecost for a 16-hour day will also allow the network to carry the televised Senate debate in its entirety if that signal should ever become available.

The core of C-SPAN's daily schedule continues to be the "live" and unedited debate of the House of Representatives carried in its entirety from gavel-to-gavel. The debate enjoys priority each day over any other taped program option we may have.

In the last two years C-SPAN has developed an impressive array of programming beyond the House debate core. Our most satisfying program is the daily "live" call-in program, which is rapidly becoming a sought after forum by Washington policymakers. Toward the end of each afternoon after the House adjourns, we invite our viewers to call in their questions and comments to a Congresman, Senator, or Administation official who is our guest in the studio. Both the viewers and the guest have responded enthusiastically. The guests appreciate the chance to hear what America is thinking. They are also impressed with the quality of questions they get. Representative Barbara Mikulski said, "Your [call-in show] audience is just terrific. . . . That's why I like C-SPAN because I couldn't do this [answer questions so thoroughly] on commercial TV." Representative Dick Cheney called the program "a short of instant feedback system. . . . It's invaluable."

So far our 305 guests have answered over 5200 questions from a thousand communities in all 50 states. Of our 160 Congressional guests, 82 were Democrats and 78 were Republicans.

The National Press Club speaker series is also available on C-SPAN. Most weeks the club invites a prominent person to address its luncheon meetings. Our network provides full coverage, including the lively question and answer period.

C-SPAN offers the Close Up Foundation seminars conducted "live" on Capitol Hill by high school students from around the country. These 30-minute programs feature a policymaker guest who is quizzed by the students on a single topic. C-SPAN and Close Up offer full off-air taping rights of the televised seminars to high school teachers to encourage maximum classroom use.

C-SPAN recently inaugurated a series based on the Close Up format featuring as guests the Presidential staff and cabinet. The series entitled "Students and Leaders" is taped at the White House and has thus far hosted such Administration officials as Edwin Meese, James Baker, and Donald T. Regan.

At the beginning of 1981 C-SPAN began taking its cameras into the House and Senate committee rooms. We now regularly cover selected hearings of the committees in their entirety. Accordingly, C-SPAN is the only media outlet that fully and accurately conveys to the American people the nuts and bolts legislative work that is conducted off the floor of the Chamber. As we grow we expect to provide even more committee hearing coverage.

C-SPAN provides the same type exposure for the Executive Branch by carrying selected hearings of the independent regulatory agencies and the cabinet departments. We have attempted to de-mystify the rulemaking process as we have done the lawmaking process by devoting programming time to such bodies as the FCC, FEC, ITC, and the Consumer Product Safety Commission.

C-SPAN has demonstrated its versatility through its carriage of what we call special event programs. These are events that do not fit easily into a single category but are, nevertheless, significant to the public debate. These include public meetings such as the National Governors' Conference, the Conservative Political Action Conference, and the A.D.A. Roosevelt Centennial Conference. We even covered the Congressional Baseball Game. We have given our viewers an inside look at the news media through our visits to the newsroom of the Washington Star, the Philadelphia Inquirer, and the Washington bureau of the Los Angeles Times and the Scripps-Howard News Service; but the full range of non-government public affairs programming is too wide to fully describe here. The attached list of C-SPAN's special event coverage provides a more complete view of the extent of our commitment to serving as a complete public affairs network.

Recently C-SPAN began regular coverage of "The American Debate"—a weekly debate program sponsored by The Roosevelt Center for American Policy Studies and American University. Each Sunday night for an hour two advocates, usually Congressmen, argue a proposition in the Lincoln-Douglas type debate format. The unique feature is that for a second hour the C-SPAN television audience is invited to participate by calling in their own comments or questions to the advocates. That aspect of the program allows it to live up to its name.

C-SPAN IS A PRIVATE AND INDEPENDENT COOPERATIVE

C-SPAN receives no government support for its operations, nor does it seek such support. The network jealously protects its status as an independent news and public affairs organization with no dependence on the public treasury. C-SPAN is also a creature of the cable television industry and is wholly supported by the industry.

C-SPAN's operating revenues are derived from an affiliation fee paid by cable systems that carry the C-SPAN signal. The fee is based on the customer count of each system and is assessed at a rate of 3¢ per month per subscriber. There is a minimum charge of $5.00 per month for each communications outlet affiliating with the C-SPAN network. As a non-profit cooperative, C-SPAN reinvests all excess revenues, if any, in improving its service. The expense of satellite time, production equipment, and expanded staff has easily absorbed all of C-SPAN's revenues to date and will continue to do so for the foreseeable future. New monies are always being sought to better inform our audience.

In the near future C-SPAN will grow. We have recently received assurances from several large cable companies that C-SPAN's expanded 16-hour format will be available to their subscribers in its entirety. As the industry replaces aging cable plant and as channel capacity expands on smaller systems, C-SPAN will be there. All franchising proposals for the urban areas include C-SPAN in the bids. We are thus assured of full carriage in the cities in the years ahead. In addition to subscriber growth, C-SPAN always looks forward to improving its product—doing a better job. More types of programming, a twenty-four hour schedule, and perhaps even a second channel of television are all being contemplated.

THE PUBLIC RESPONSE

When C-SPAN first began carriage of the Congressional debates there was much speculation that it could never compete with the soap operas. Everyone agreed the audience would be small, but everyone underestimated the strength of the desire among a significant segment of the television viewing public for a serious alternative to the commercial network fare. C-SPAN does not compete with the soaps because it reaches an entirely different audience. It fills a very significant void in television programming. Just how big of a void is hinted at in the hundreds of letters C-SPAN receives each week. Another indication is the result of a survey conducted recently in Columbus, Ohio on the "Qube" system—an interactive Warner/Amex Cable system there. The survey revealed that 32 percent of the subscribers to the system watched C-SPAN at one time or another. Despite the limitations of that one-time survey taken of an audience at 6:30 p.m., the fact is that nearly one-third of the system's subscribers found C-SPAN worth watching. The percentage might have been even higher had the survey not been conducted at a time when other viewers likely to be supportive of C-SPAN were watching the evening news programs.

From the first moment of its operation C-SPAN sparked an interest in the work of Congress among a cross section of the American public. We began to hear immediately from our audience, and they are still writing. A recent letter from Atlanta, Georgia is typical:

"Bravo! One of the best things to happen to TV since the Watergate hearings. On behalf of the 'silent apolitical majority', your coverage of the House's daily business and related hearings has caused me (age 40) to finally take an active interest in the national political scene."—Atlanta, Georgia

C-SPAN as an inspiration to become involved in public affairs is a theme that is repeated in our mail. Viewers also report that after watching legislators at work on the day-to-day business of running the government, they have much greater confidence in our system. The following letters are representative:

"C-SPAN has rebuilt my confidence in our government. I can see that hearings bring in excellent people to present facts to the committees and the legislators spend countless hours gathering information."—Huron, South Dakota

"C-SPAN gives the best insight into the Federal government I have ever seen. It tells the public a lot about the Congress they need to know and aren't told anywhere else."—San Antonio, Texas

A fundamental rule at C-SPAN is that all public business be presented from gavel-to-gavel and without editorial comment. This approach to public affairs television is essential if C-SPAN is to fulfill its public service goal of non-partisan, unbiased programming. Our viewers heartily agree:

"God, what a refreshing idea to present events, news, people's opinions and guests and leave it to the viewer to decide in his own mind what his opinion is of what he has just seen . . . .I resent some news commentator reporting some news event to me and then saying, 'Now this is what it means.'"—Orange, Texas

Although the cable television industry is hampered technologically in its effort to precisely measure the size and type of the audience for any given program (there is no Neilsen rating at present for cable as there is for broadcasting), C-SPAN can describe its audience with reasonable accuracy. C-SPAN viewers tend to be those who are already curious about public affairs, if not actually active in their communities. They are the men and women who serve on the school boards, join the civic organizations, attend local government meetings, write letters to the editor, and generally make a community work. They comprise the informed electorate that is essential to the smooth functioning of a democracy. Our audience also includes those who had been unaware of the complicated process of government until they were introduced to it by C-SPAN. We are pleased to be part of this growth in the ranks of an informed electorate.

THE C-SPAN IDEA IS WORKING

The cable television industry, through C-SPAN, is accomplishing what it set out to do. It is clear to us from our mail and the response to our daily call-in programs that we have indeed brought many of the American people closer to their government. We have done so without bias, and without government support. We intend to continue on this path.

[ATTACHMENT]

C-SPAN PUBLIC AFFAIRS PROGRAMMING

The following is a list of public affairs programs that have appeared on C-SPAN. All events were presented in their entirety without interruption or editorial comment.

SPEECHES, CONFERENCES, AND SPECIAL EVENTS

Ambassador Jean Kirkpatrick Address to B'nai B'rith
David Broder Address to the Women's National Democratic Club AFL-CIO President, Lane Kirkland, Labor Day Address
Symposium at George Washington University: The Congress, The Presidency, and the 1980 Election
Foreign Policy Panel Discussion at the Washington Post
Washington Press Club Salute to Congress
Consumer Federation: What's Ahead for Consumers
Agriculture Secretary John Block Address to the Rural America Society
Representative Jack Kemp Address to the National Urban Coalition
1981 National Governors' Conference
Seminar at Johns Hopkins University: Foreign Relations
FCC Chairman Charles Ferris Address to the Washington Cable Club
Prime Minister Margaret Thatcher Address to Georgetown University
Veterans of Foreign Wars Convention
Construction Industry Legislative Conference
Junior Achievement: National Business Leadership Conference;
Tony Navarro of Grace Company Address to the Media Institute
Vice President George Bush Address to the National Association of Manufacturers
President Ronald Reagan Address to the AFL-CIO
Residential Construction Forecast Conference
Congressional Baseball Game
American Society of Newspaper Editors: Panel Discussions
Accuracy in Media Conference: Confrontation Public Relations
American Legion Girls' Nation
American Legion Boys' Nation
Women's Economic Round Table: The Economics of Defense Spending
Policy Study Group at Georgetown University: Domestic and Foreign Policy
Presidential Assistant Max Friedersdorf Address to U.S. Chamber of Commerce
News Conference: Air Traffic Controllers Strike
Mayor Marion Barry Addresses to the National Black Police Association
H.U.D. Secretary Samuel Pierce Address to Blacks in Government
Cable Television and Marketing Discussion: Cable-Newspaper Relationship
Representative Richard Bolling Address to the Washington Press Club.
Salute to Sol Taishoff, Publisher of Broadcasting Magazine
Senator Daniel P. Moynihan. Address to the Women's National Democratic Club
Sigma Delta chi Professional Journalists Convention
Panel Discussion at Georgetown University: Turmoil in Europe
Congressional Quarterly Seminar: The Legislative Process
National Conference of State Legislatures
American Enterprise Institute Public Policy Dinner.
Senator Howard Baker Year End Meeting with Gannett Newspapers
Seafarers International Union Convention
Pageant of Peace at the White House
American Enterprise Institute: Assessing Reagan's First Year
World Affairs Council: The Polish Crisis and the U.S. Response
Democratic National Committee Executive Meeting
Planned Parenthood Convocation on Abortion
Conservative Leadership Conference
Democratic National Committee Seminar: Politics and the Media
U.S. Conference of Mayors
World Affairs Council: Great Decisions in 1982
A.F.G.E. Legislative and Political Action Conference
Common Cause Governing Board Meeting
Inauguration of National Press Club President
International Communications Agency: Let Poland be Poland
Barry Bosworth Remarks to National Economists Club Luncheon

Panel at University of Maryland: Assessing Reaganomics
Representative Ronald Dellums Address to the National Education Association.
1982 National Governors Conference
Conservative Political Action Conference
White House Conference on Aging
National Association of Social Workers Conference
Jack Watson Address to Emory University
Financial Analysts Federation Conference
Duke University Forum: Presidential Nominations
Senator Orrin Hatch Address to Machine and Tool Mfg. Association.
John K. Galbraith Commencement address at Johns Hopkins University
American Jewish Congress: The Israeli Election—An Analysis
Duke University Forum: The Role of National Conventions in Nominations
National Association of Business Economists Panel: Supply-Side Economics
H. Kerbal Stokes Address to the National Economics Club
National Foreign Trade Convention
Mark Shields Address to Women's National Democratic Club
John Sears address to American League of Lobbyists
News Conferences: Gray Panthers at White House Conference on Aging
Annual Meeting of Allied Social Sciences Association
Wayne Horvitz, Arbitrator, Address to National Economists Club
AFL-CIO President Lane Kirkland address at solidarity day
American Society of Newspaper Editors Convention
National Conference on Workers' Compensation and Work Place Liability
Associated Press Convention: America Beyond the Eighties
Third Annual Conference of the American Stock Exchange
National Federation of Independent Businesses: Seminar on Social Security
Former Secretary of State Edmund Muskie Address to Galludet College
Georgetown University Center for Strategic and International Studies Panel: Turmoil in Europe
American Enterprise Institute: Private Sector Initiatives
Hugh Downs Address to National Citizens Committee for Broadcasting
Representative Tom Luken Address to NEDACAP on Air Quality
President Ronald Reagan Foreign Policy Address to the National Press Club
Computer and Business Equipment Manufacturers Association Convention
Democratic National Committee Meeting: Presidential Nomination Process
Health Industry Manufacturers Association Washington Conference.

News Media Programs

A day at Scripps-Howard News Service Washington Bureau
Tour of Washington Star Newsroom
Philadelphia Inquirer and Presidential Primary Coverage
Tour of Los Angeles Times Washington Bureau.

National Press Club Speakers

Max Friedersdorf
Jack Kemp (R-NY)
Fred Bergsten
John Quarles
Roland Bernard
Roger Smith, President of Gereral Motors
Robert Gray and Charles Wick, Co-Chairmen, Inauguration
David Stockman, OMB Director
Chun Doo Hwan, President of South Korea
Donald Regan, Secretary of the Treasury
William Bolger, Postmaster General
Del. Walter Fauntroy (D-DC)
Joe Gibbs, Redskins Coach
Charles Monatt, Chairman, Democratic National Committee
Dr. Al-Chalabi, OPEC
Henry Kaufman, Economist
Robert A. K. Runcie, Archbishop of Canterbury
Zenko Suzuki, Prime Minister of Japan
James Binns, National Association of Manufacturers President
I. F. Stone, Journalist
Eleanor Smeal, NOW President

John Denver, Musician
John Lehman, Secretay of the Navy
Roger Steven, SPCA
Richard T. Pratt, Federal Home Loan Bank Board
Paul Volcker, Chairman, Federal Reserve Board
Vice President George Bush
Luis Herrera Campis, President of Venezuela
Murray Weidenbaum, Council of Economic Advisors
Dan Rostenkowski (D-IL)
Stevie Wonder, Musician
Mrs. Ian Paisley
J. D. Robinson, American Express President
James Rowe, F.D.R. Staffer
Hosni Mubarak, President of Egypt
Senator Charles Percy (R-IL)
Francis Coppola, Film Producer-Director
Ranier Gut, Credit Suisse
Colette Flesch, Vice President of Luxembourg
Kathy Whitmire, Mayor of Houston
Governor Richard Lamm, Colorado
Raymond Donovan, Secretary of Labor
Jim Wright, House Majority Leader (D-TX)
Malcolm Baldrige, Secretary of Commerce
Franklin Thomas, Ford Motor Company
Helmut Schmidt, West German Chancellor
Alan Boyd, President of Amtrak
Richard Richards, Republican National Committee Chairman
Robert Willis, Natural Water/Gas Assoc. President
James Baker III, Presidential Advisor
Lee Iacocca, Chrysler President
Jack Carlson, National Association of Realtors
Walter Stoessel
Jose Duarte, President of El Salvador
Donald Siebert, United Way President
William French Smith, Attorney General
Samuel Pierce, Secretary of H.U.D.
Governor John Y. Brown, Kentucky
John Block, Secretary of Agriculture
Pat Hayes, Performing Arts Society President

Executive Agency Hearings

Federal Communications Commission: Cellular Radio
Civil Aeronautics Board: General Business
Consumer Product Safety Commission: Toy Safety Program
International Trade Commission: Steel Imports
Department of Energy: National Energy Plan
National Transportation Safety Board: Air Florida Flight 90 Crash
Commission on Wartime Relocation and Internment

Congressional Committee Hearings

COMMITTEE OR SUBCOMMITTEE, AND SUBJECT

Senate Labor and Human Resources—Status of Auto Industry Workers
House Task Force on the Economy—Productivity
Joint Economic Committee—The Economy
Senate Commerce—AT&T Divestiture
House Telecommunications—AT&T Divestitute
Senate Judiciary—Voting Rights Act
House Foreign Affairs—El Salvador
House Ways and Means—Tax Status
House Interior—National Park System Oversight
House Approriations—Fiscal Year 1983 Budget
Senate Banking—Monetary Policy
Joint Economic Committee—International Trade Policy
Senate Juvenile Justice—Juvenile Reform Institutions
House Budget—Fiscal Year 1983 Budget

House Agriculture—Fiscal Year 1983 Budget
Senate Banking—Banking Reform
House Government Operations—Mine Safety
House Foreign Affairs—El Salvador
House Energy and Commerce—AT&T Divestiture
Senate Budget—Monetary Policy
Senate Committee Confirmation Hearings: Malcolm Baldrige, Richard Schweiker, Drew Lewis, Donald Regan, Caspar Weinberger, David Stockman, James Watt, William Casey, James Edwards, Samuel Pierce, Terrel Bell, Jean Kirkpatrick, William French Smith, Raymond Donovan, Robert Inman, John Block, William Clark, Sandra D. O'Connor
Joint Economic Committee—Reagan Budget Proposals
House Ways and Means—Social Security
Senate Governmental Affairs—Mob Activity and Longshoreman's Union
Senate Agriculture—General Farm Legislation
House Inter-American Affairs—El Salvador
House Ways and Means—Social Security Financing
Senate Science, Technology and Space—NASA Authorization
Senate Budget—Markup of the Budget
Senate Labor and Human Resources—Sub-Minimum Wage
Senate Select Committee on Aging—Effect of Budget Cuts on Medical Aid
Senate Finance—Reagan Budget Proposals
House Foreign Affairs—State Department Authorization
Senate Veteran Affairs—Veterans' Legislative Agenda
Senate Treasury—Assassination Attempts
Senate Foreign Relations—Military Foreign Aid
Senate Judiciary—Death Penalty
Senate Labor—Alcoholism and Drug Abuse
Senate Budget—Local Government View of Budget Cuts
Senate Rules—Television in the Senate
Conference Committee—Budget
Senate Judiciary—Abortion and Origin of Life
Senate Finance—Tax Reduction Proposals
Senate Labor and Human Resources—Progress of Cancer Research
Senate Judiciary—School Busing
House Task Force on Women and Social Security
Senate Finance—Tuition Tax Credits
Senate Environment and Public Works—Water Policy
House Foreign Affairs—Budget Reconciliation
Senate Commerce—Communications Deregulation
House Post Office and Civil Service—Government Cost Reduction Act
House Foreign Affairs—Bombing of Iraqui Nuclear Reactor
Senate Finance—Markup of Tax Bill
Senate Finance—Funding Social Security
Joint Senate Banking and Finance—U.S. Trade Policy
House Interior—Nuclear Waste
House Judiciary—Voting Rights Act
House Foreign Affairs—Nuclear Proliferation
House Interior—Strip Mining
House Education and Labor—School Lunch Program
House Budget—Second Concurrent Budget Resolution
House Energy and Commerce—Acid Rain
Senate Labor and Human Resources—Youth Marijuana Use
House Select Committee on Aging—President's Commission on Aging
Senate Judiciary—Violent Crime
House Foreign Affairs—Egypt-Israel Peace Treaty
House Judiciary—CIA Domestic Spying Ban
House Armed Services—Department of Defense Procurement Policy
Senate Government Affairs—Budget Process Oversight
House Ways and Means—International Trade Policy
Senate Foreign Relations—Strategic Weapons Proposals
House Veterans Affairs—Government Employment of Veterans
House Judiciary—Immigration of Amer-Asian Children
House Interior—Nuclear Power Plant Construction
Senate Rules—Federal Election Campaign Act
House Judiciary—Missing Children
Senate Governmental Affairs—Regulatory Enforcement

House Foreign Affairs—Transfer of Nuclear Materials
House Banking—Current Economic Policies
House Banking—Budget Cuts and the Cities.

Senator Goldwater. Thank you very much.

There is some argument on that in the Senate, but now there are some who want to televise in the Senate and a lot of us who do not.

Mr. Lamb. I understand that.

Senator Cannon. I will pass, Mr. Chairman.

Senator Goldwater. Mr. Hauser, your company serves Cincinnati, Ohio?

We heard yesterday from Ms. Stull that the city was having a terrible time controlling your company.

Would you care to present your side?

Mr. Hauser. Thank you, Mr. Chairman. I am very pleased to have the opportunity to do that. I was not present yesterday, but I have heard some of the issues which were presented, and having looked into them prior to this meeting I must tell you that I believe they are essentially issues of fact. And I think there are some good faith mistakes which were indicated yesterday on the part of Ms. Stull.

We are only now in the early phases of construction in the city of Cincinnati. We are at the same time, as I said, one of the major cable operators of this country. We are in the process of constructing such cities as Houston, Dallas, Pittsburgh, St. Louis suburbs, Chicago suburbs, and I could go on and on. We are not inexperienced in this matter. We are also investing very, very large sums of money. We have a very competent organization, and I assure you that Ms. Stull's statements that as we do not have a viable engineering design can hardly be true. We certainly do. We know what we are doing, and this goes to the issue of whether regulation at the local level is in all cases really helpful.

The regulatory zeal which was exhibited is an example of what occurs when cities attempt to, in effect, run or business based on the nexus of having granted a license We cannot easily deal with this problem in the regulatory atmosphere which now exists. I submit to you that we are competently and on time rapidly building one of the best cable systems in America in Cincinnati. We are already operating in the Cincinnati suburbs very successfully

One of the points that was made—and I think I should address it—was that we have failed to offer access to a Cincinnati alarm company. Now, Mr. Chairman, I think you should understand that situation because it is typical of what is going on. The alarm company in question came to us and said they would like to use our technology, which we developed at very great cost and at great risk, QUBE interactive technology by which we are able to electronically poll every house. They asked us to do that for them, that is, poll households and pick up their burglar alarm signals. And in good faith we made an offer to them to do that, although I do not believe we were required to do so.

It was not simply a question of "leasing a channel." We were asked and are offering to do a great deal more. We made that offer on February 3. I have it here with me. And on February 10 we received a letter from the alarm company which I would be happy to submit for the record. It said in essence, "We will be back to you in some 10 days. We hope we will be able to bring these negotiations to a successful conclusion." Warner Amex has not heard from them since that time, Mr. Chairman, and we are still waiting.

But in all cases where we have been requested to provide access, we are negotiating with the requesters in good faith, and this is typical of the situation.

Senator GOLDWATER. Thank you very much.

Senator CANNON. May I ask him a couple of questions?

Senator GOLDWATER. Go ahead.

Senator CANNON. Mr. Hauser, Warner Amex was a pioneer in the development of two-way interactive system with QUBE in Columbus, Ohio. Do you think S. 2172 adequately addresses the future uses for cable telecommunications?

Mr. HAUSER. Well, Senator, I think the question of S. 2172 is whether in any way it would provide roadblocks to the further development of cable communications. We and others in the communications industry who have pioneered with major risk investments, are very concerned about premature regulation of a developing industry that has made almost unbelievable progress in the last 5 years, and may double it and make unbelievable progress in the next 5 years. Premature regulation may stifle that growth because it is going to put us into arbitrary molds which do not fit our business.

My request of this committee is that, so far as possible, we be given the greatest freedom to continue that experimentation which has put us in the worldwide leadership of communications, and that things that are premature be held until a problem is demonstrated so that our freedom to innovate is not cramped in any way. I think that is in the interest of our whole country.

Senator CANNON. Well, now, you have a privacy code to protect the rights of your subscribers.

Should the right of privacy be left to the cable operators and the subscriber, or should Federal guidelines be established to protect the subscriber's right of privacy?

Mr. HAUSER. Senator, this is a very serious issue and we are very concerned with it. I would like very briefly to point out that self-regulation has been working in this industry, if there is a problem. We issued the industry's first privacy code—I believe a copy of that is available to you. I hope it will be widely adopted, and I think it fully protects against any peril to subscribers.

What I am concerned about is that cable is being singled out as having some special privacy issue different from all other industries who use computers. We have just begun to use computers. We do not even know what we are going to do with them 3 years from now, and now we are threatened with all kinds of rules that could stifle all the things we have in mind.

We want to experiment. If a problem exists and it requires regulation, that regulation can be imposed with no difficulty. Today we have far less information that could imperil anyone's privacy than banks, than insurance companies, than telepone companies, than the Federal Government. I am not sure that we have very much information at all that is really a problem.

So for the time being I think Federal legislation is required merely to preempt without regulating this field, and we very much want to avoid inconsistent and conflicting State and local regulations which would be premature and which would threaten the viability of our present business and the viability of the future business that I am alluding to.

Senator **CANNON**. That is an unusual concept. You say you want the Federal Government to preempt the field but not adopt regulations. I think that is a pretty tough thing to do. Usually if you find the Federal Government preempting the field, they are preempting it by regulation and saying that somebody else cannot get into that area because regulations have been established.

Mr. **HAUSER**. Senator, I believe there are precedents for my position. In order to avoid a confusion of rules all over the country, the FCC, in its wisdom—and I think it was great wisdom—many years ago, preempted pay television and did not regulate it. It said no one else could, either, in order that such service could flourish and we could experiment and avoid a hodge-podge of rules that would have made today's flowering of pay television absolutely impossible.

Indeed, may I point out to you that in 1977 when I started the QUBE interactive service in this country, there were many, many locations where we could not effectively provide such services. We had to pick a place where the regulatory climate would allow us do it. And after all, what was it that we did that was so dangerous? But there were many communities where it was impossible, and therefore we could only go, as it turned out, to Columbus, Ohio.

Senator **CANNON**. Thank you, Mr. Chairman.

Senator **GOLDWATER**. Mayor Drinkwater, S. 2172 permits non-Federal authorities to regulate basic subscriber rates and rates charged programers for public educational and governmental access channels. The bill prohibits regulation of rates charged programers for use of leased channels.

Do you agree with this division of rate regulation authority?

Mayor **DRINKWATER**. No. I would like permission to submit a specific answer on that. I do not agree with it, but I would like to talk with my staff.

Senator **GOLDWATER**. All right, that will be submitted for the record.

[The following information was subsequently received for the record:]

As indicated in my prepared testimony, the limited authority given municipal governments to impose rate regulation by S. 2172 will create major problems. First, the bill takes too narrow a view of what constitutes the basic set of services every cable subscriber should receive in return for their montnly hookup charge. Modern cable systems offer a large variety of services. For example, the system to be installed in Scottsdale will offer many services in addition to broadcast signal transmission, including the following:

Satellite channels originated exclusively for cable TV (e.g., CNN—the Cable News Network);

Public access;

Continuing education;

An institutional network, which will include audio-video teleconferencing, telemetry and data transmission (up to 1.5 Mbps).

In addition, the system will offer some traditional "pay services," including:

Pay entertainment;

Interactive services, e.g. shop-at-home and information data bank services;

Teletext.

None of these services are offered by other competitors to any significant degree within Scottsdale. While the FCC has authorized over-the-air pay TV services in some cities, for the most part these services, which compete with CATV pay services, are limited in terms of both areas covered and the number of frequency channels made available. Similarly, the local telephone company offers some competition (e.g. low speed data transmission and audio teleconferencing). However, for the most part cable systems operate largely as a monopoly. They face no effective competition for most services and, absent local rate regulation, have no practical competitive restraint on their prices. They are limited only by consumers' willingness to pay—the classic definition of monopoly pricing power.

Leased channels, subject to effective rate regulation, will promote competition. That is why leased channel services are so important. But if the cities and states are prohibited from rate regulating leased channels, cable operators will be able to price such channels at excessive or discriminatory rates whenever a person tries to lease a channel to compete directly against the cable operator's own services. It is, therefore, important for local governments to have rate regulation authority over all cable services, particularly over those services that should be available to all subscribers as part of their basic monthly subscription charge. It is critical that leased channel rates and access be subject to local regulation if real competition is to be encouraged.

Please remember that a local grant of a franchise to operate a cable system is usually tantamount to a grant of monopoly, whether or not the franchise is exclusive. Once a cable operator has the franchise, the only effective restraint on his rates, absent local rate regulation, is the elasticity of demand. Since S. 2172 would permit only regulation of the rates charged for a very limited number of services on a cable system, it would proscribe the cities from controlling rates for any channels which become of importance to the economic welfare of the community, or which exhibit real monopoly pricing power by the cable operator.

I do not believe cities should necessarily regulate rates for all channels on a CATV system. However, the cities do need authority to restrain monopoly pricing power and market exclusion power when the situation demands it. Where there is no significant competition to the cable operator, and no effective pressure forcing a cable operator's charges for these services toward the cost of producing the service (which will be the case in Scottsdale), consumers are at the mercy of the cable operator.

Rate regulation need not be oppressive nor burdensome. In our recently enacted cable ordinance, the operator has the authority to raise rates annually by either the rate of increase in the Consumer Price Index, or 5 percent, whichever is less. Additionally, our ordinance requires the City to respond to the operator's request for a rate increase in excess of 5 percent within a limited period of time, or the operator has the authority to raise rates as requested. The ordinance also specifies that leased channels must be made available on a first-come, non-discriminatory basis at reasonable rates. All of these requirements except those applicable to broadcast retransmission channels and government information channels, would be prohibited under S. 2172. In our opinion, the Scottsdale regulations are needed to protect our citizens, and we strongly object to any federal government intrusion which limits our powers in this regard.

Senator GOLDWATER. Mr. Blow, is it appropriate for access programing to be included in basic service?

Mr. BLOW. Senator, I believe that most cable systems have access programing in their basic service. I cannot answer for all over the country. I can answer for those I am familiar with. I know that we first put it on in 1954 and built a full studio, even in our small town, in 1964, long before the Government or the cities were ever requiring it. We put it on as our basic, as a way to attract customers. We found after a couple of years of experimentation that there was not much interest in access channels. We kept it open for another 10 or 12 years before we finally used that channel.

I do not believe it should be mandated by law. I believe that is something that the cable system operator, in his way to try to acquire customers, attract customers, should be left to the cable operator.

Senator GOLDWATER. Mr. Lamb, could you tell us——

Senator CANNON. May I ask Mr. Blow a question?

Mr. Blow, the sports blackout provision would affect only those individuals who live in cities with professional sports teams. Why should we delete the provision when professional sports teams repeatedly tell us that they cannot survive if there is increased competition to the live gate and local broadcasting if there are more games broadcast on cable television?

Mr. BLOW. Senator, I personally believe that the publicity that television gives any industry, whether it is baseball or football, increases the awareness of the sport and is not going to be detrimental to the sport's interest. I believe this is just a monetary thing they are looking for.

In answer to your question more specifically, why in the smaller towns, we believe that if it is made impossible to do this in the major cities, that nobody will be putting it up on the satellite and we will not be receiving it in our town, even though legally we may be able to put it on. Since I am way out of the class B contours, even, we do not believe it will be available for us to pick up.

Senator CANNON. Thank you.

Mr. BLOW. I might add that soccer has never been very popular in this country, but since cable television has been devoting on the ESPN and so forth, soccer is starting to get more popular. I believe that is because of the exposure. I do not think we have hurt anything that is being shown.

Senator GOLDWATER. In the case of isolated communities such as yours, there should be no prohibition against anything being used by the States.

Do you agree with that?

Mr. BLOW. Yes, sir, I do agree with that. We have to have the source. We are too small to attract this ourselves, and if this is killed off by some type of regulation, we have to depend on systems like Mr. Hauser has and so forth to get these things originated and started. If they are prohibited from getting it started, then we will, too.

Senator GOLDWATER. Mr. Lamb, if you care to you can. Would you tell us how much it costs to run C-SPAN for a year, and where do you get the money?

Mr. LAMB. Senator Goldwater, it costs us this year approximately $2½ million to provide about 5,000 hours of public service television via satellite. That does not sound like a lot of money, and it is not, although it is not often the easiest thing to come by in this current economy. The money comes entirely from the cable television industry. I think one of the interesting things about C-SPAN was that there was no regulator with a gun at this industry's head saying you must develop a C-SPAN or you must carry the House of Representatives, or you have a public affairs requirement. This was totally independent and done by 22 different people heading up the major cable television companies, and they pay all of our freight every year. We get no money from the Federal Government, and as long as I am there we will not get any money.

Senator GOLDWATER. Again, Mr. Lamb, what percentage of the cable television systems in this country use C-SPAN?

Mr. LAMB. If you talk about the total numbers of cable systems versus the systems that use C-SPAN, it is about one-fifth, approximately 900 or 1,000 systems. We have just gone through a transition period, so we have had a reduction in the number of systems that carry us in the last couple of weeks. In terms of the number of cable television subscribers nationwide, it is closer to about, a little bit more than one-third. A lot more people get it than systems.

Senator GOLDWATER. Mayor Drinkwater, is local rate regulation authority as effective an oversight tool as some have suggested, and what other tools do you believe non-Federal officials should use to guarantee compliance with a franchise?

Mr. DRINKWATER. Is Federal regulation effective?

Senator GOLDWATER. Yes.

Mr. DRINKWATER. What other franchise enforcement tools, in addition to rate regulation, do local authorities have to insure compliance with the franchise document? Let me list for you the following local franchise enforcement mechanisms that are available to Scottsdale citizens:

First, local regulation will be administered through a citizens' commission. This commission will hold monthly meetings, and will serve to make visible to the community the operations and functions of the cable system. Since bad publicity is certainly not in the cable company's interest, the mere fact of local community visibility serves as an enforcement tool.

Second, the cable company will post a performance and payment bond to insure compliance with all construction schedules and procedures.

Third, the cable company is required, by contract, to submit periodic reports of its operations. Such periodic reports will allow the community to monitor the cable system, and compare actual operations against original projections.

Fourth, the community will conduct a "performance evaluation" review at periodic intervals—years 3. 5, and 10 of the franchise. These reviews will afford the community an opportunity, in a formal setting, to comment on the performance of the cable system. You must remember that the cable system will be an important member of the Scottsdale community. It is therefore important that the Scottsdale community be allowed to provide the cable company with feedback as to community satisfaction with the cable service provided. These performance evaluation reviews will allow that feedback to take place.

Fifth, perhaps most importantly, Scottsdale has established "liquidated damage" provisions, ranging from $100 to $500 per day, for failure to meet any of the terms and conditions of the contract.

Sixth, finally, the city has the right, by contract, to purchase the cable system—particularly if the cable company fails to meet community needs and expectations with regard to the delivery of cable service. This is not an option that the city of Scottsdale contemplates ever using; nevertheless, we believe it an important last enforcement tool to encourage the cable company to meet its contractual obligations.

Seventh, the city has, by contract, the right to terminate the franchise for cause. This is also a "last ditch" option, and would mean that all efforts to insure compliance with the contract had failed.

Therefore, Senator, there are a number of local franchise enforcement tools available. Frankly, Scottsdale does not consider rate regulation to be a particularly effective franchise enforcement tool. We intend to exercise our rate regulation responsibilities only to protect community subscribers from unreasonably high rates for service. We do not intend to use rate regulation as a means of forcing compliance with contractural obligations. There are a number of other remedies for that—the most important being the imposition of liquidated damage penalties.

Nevertheless, rate regulation is considered to be extremely important as a protection for our citizens against unreasonably high rates.

Additionally, S. 2172—as presently drafted—establishes a preemptive Federal authority over major components of cable operations, and prohibits cities from exercising any regulatory oversight and enforcement tools for those issues. This is not in the best interests of the citizens of Scottsdale, and I strongly object to such preemptive Federal authority.

Senator GOLDWATER. You really have not had enough experience, have you?

Mr. DRINKWATER. We just signed our contract on the 6th of this month. It was about a 2½-year process. What our citizens want is the right to regulate cable television in Scottsdale. They feel that home rule should persevere in this matter.

Mr. HAUSER. Senator, may I comment on the rate regulation issue?

Senator GOLDWATER. Yes.

Mr. HAUSER. I have lived with that situation for many years, and I want to say that rate regulation is really a totaly unnecessary process, because we are a marketplace service, except where signal reception is available. In my experience it has not been a scientific process; there is no formula for setting rates, it tends to be arbitrary, a political process which has no parameters whatsoever, and a great burden on the city administrations that undertake it. Many have dropped it for such reasons; because they can find no rational way to regulate rates in our industry, and they find it is a great burden on them.

Furthermore, I think that rate regulation is a subtle form of program determination. Suppose, for example, a cable operator wishes to carry a program that is going to cost him money. Let us take as an example a cable operator who wants to carry Nickelodeon and it is going to cost him several cents per month per subscriber. Nickelodeon is a children's program. It is not supported by advertising. The money has to come from someplace. It has been nationally acclaimed. Many systems want it. That cable operator—and it might be the gentleman to my right—goes to his city council and says "I want to carry this good programing, but you understand, it is going to cost some money, and I would like to raise my rate 10 cents a month. Of course, he is going to add other things to that rate discussion that also causes rates to go up, such as inflation in general, and his costs. Very often the city council says "no, you are not getting that permission. We do not think you should raise your rates." They have effectively made a program decision because the cable operator will not be able to carry Nickelodeon. Where will we get the money for it?

No one has asked the subscribers whether they want that program. No one has asked the subscribers whether they are willing to accept the new rate.

That is why I say it is a very arbitrary process, and subtly a program decision being made by government. I think it is bad. I think it is detrimental to our subscribers, and it is improper for government to be involved in these kinds of decisions.

Senator GOLDWATER. I would like to ask you a question before you leave.

Is your QUBE system available to anybody that wants to use it?

Mr. HAUSER. Senator, the system is a technology. The services are as we invent them. The equipment that we use is available. The manufacturer has made it generally available to anyone who wishes to purchase it. The computer software which makes it work is ours. It is a creative thing, it is not a commodity. But anyone can develop computer software, and they are doing it, and this kind of interactive two-way service is becoming generally available throughout the country as the economics permit it.

Senator GOLDWATER. For the benefit of those of us who have only heard of the QUBE system for the first time, it is a two-way system where the cable operator can ask do you favor Candidate X or Candidate Y, and they punch a button and it goes immediately to the operator's station, and they can publish which is the most favored candidate. It can apply to any situation. I think it is a great idea. I think it should be spread across this country. We may do away with elections.

Thank you, gentlemen.

Our next panel will be Mr. Ralph Baruch, chairman and chief executive officer, Viacom International, Inc.; Mr. Henry Geller, an old friend, director of the Washington Center for Public Policy Research; Mr. Morris Tarshis, director of franchises, Bureau of Franchises, city of New York; Mr. Ralph Lee Smith, vice president of the Bertman Group, Inc.; and Mr. Edward Burke, President of the National Association of Regulatory Utility Commissioners and chairman of the Rhode Island Public Utilities Commission.

Gentlemen, please be seated, and I just want to remind you about the little light bulbs up here. We will put all of your statements in the record complete. We are not going to be too tough on this red light, but we do have a little time problem today. So let's see, I think Mr. Baruch will be first.

STATEMENTS OF RALPH M. BARUCH, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, VIACOM INTERNATIONAL, INC.; HENRY GELLER, DIRECTOR, WASHINGTON CENTER FOR PUBLIC POLICY RESEARCH; MORRIS TARSHIS, DIRECTOR OF FRANCHISES, BUREAU OF FRANCHISES, CITY OF NEW YORK; RALPH LEE SMITH, VICE PRESIDENT, THE BERTMAN GROUP, INC.; AND EDWARD F. BURKE, PRESIDENT, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND CHAIRMAN, RHODE ISLAND PUBLIC UTILITIES COMMISSION

Mr. Baruch. Thank you, Mr. Chairman. I thank you for letting us put my statement into the record. My comments will be very brief.

I am Ralph Baruch. I am chairman and chief executive officer of Viacom International. There are two areas I would like to address myself to this morning. One is telephone cable cross-ownership. In view of the long history of abuses by the telephone company vis-a-vis possible competition, we support section 605(d). As a matter of fact, these abuses and the availability of poles or their reasonable lease terms by the telephone companies to the cable television industry led the Congress in 1978 to pass legislation restricting these abuses.

As written, however, section 605(d) gives the FCC ad hoc authority to grant telephone companies the possibility to provide cable service under the guise of "additional media diversity and competition."

Now, that is ambiguous wording which could lead to duplication of plant, resurfacing of exactly the same obstacles and the same abuses telephone companies have in the past inflicted on cable television companies. This included cross-subsidization to unfairly compete. This restriction should apply to both the new A.T. & T., to A.T. & T. because of its monopoly as a carrier, its ability to cross-subsidize, and its continuing relationships with the BOC's. The BOC's, in turn, will be regionally clustered, and it will once again be enormously potent.

The new A.T. & T. will continue to monopolize the long distance market, all but a minute 3 percent of which is now in A.T. & T.'s grasp. To predict what can happen, I refer you to the Justice Department's listing of horrors in their antitrust case against A.T. & T.

Cable television is not a utility. It must compete for customers with over-the-air television, with STV stations providing subscription television over the air, multichannel MDS systems, satellite-fed master antenna systems, video cassettes, and disks, and movie theaters. The list of competitors goes on and on. Competitors down the line may be direct broadcast satellites, low-power television and the numerous information systems such as Videotext or Teletext provided via telephone lines, microwave, satellite, computers, DBS. The list is unending. We have plenty of competition, and we will have plenty more.

I believe section 605(d) and its ambiguous language should be modified accordingly.

The last point I would like to discuss is our opposition to any kind of municipal ownerships. To use tax revenues paid by 100 percent of the local citizens to build and operate cable systems to which usually only about 50-percent subscribe is taxing that 100 percent for the benefit of those who do subscribe.

To go further, what incentive will the municipalities have to spend more money and keep up with the state of the art? To permit municipalities, as section 605(c) seems to do, to purchase a cable system at "fair market value" is only one step in the right direction. We strongly urge the addition of language which indicates fair market value as a going concern, and possible judicial review of this process.

Furthermore, it is unthinkable for me to visualize any kind of controls by cities over any communications medium, controls directly or indirectly, or even the raised-eyebrow controls which could be exercised.

Finally, we are just as adamantly opposed to any kind of tax-exempt revenue device to compete in a business which private enterprise can and will continue to provide. With the present squeeze in our budgeting processes, it is fiscally irresponsible to forgo this kind of revenue, to build a municipally owned cable business which private, taxpaying enterprise is willing to finance, to build, and to make into a revenue-producing entity.

The intense competition for cable television franchises is well known. Why forgo private enterprise in favor of a nonrevenue-producing municipal substitute?

Thank you very much.

[The statement follows:]

STATEMENT OF RALPH M. BARUCH, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, VIACOM INTERNATIONAL, INC.

Good morning Mr. Chairman and members of the Subcommittee. My name is Ralph M. Baruch. I am the Chairman of the Board and Chief Executive Officer of Viacom International, Inc. Viacom is a major operator of cable television systems and as such has a vital interest in provisions of S. 2172.

First, let me say that Viacom applauds the efforts of S. 2172 to deal with the respective roles of the telephone company monopolies and local government authorities in the cable business. In this context, my remarks today are limited to three aspects of this legislation. First, the continuation of the existing cross-ownership restrictions between telephone companies, including the Bell Operating Companies (BOC's), and cable systems within the service areas of the telephone company. Secondly, the elimination of any restriction on AT&T to enter into the cable television business. And thirdly, the subject of governmental ownership of cable television systems.

SECTION 605(d): RESTRICTIONS ON TELEPHONE/CABLE CROSS-OWNERSHIP

Section 605(d) of the Bill codifies the existing FCC ban on cross-ownership between a cable television system and a telephone company in the latter's operating area. Viacom fully supports this provision, but without its troublesome exception. Telephone companies have a long history of anti-competitive abuse toward competitive service offerings, particularly those supplied by the cable television industry. This pattern of conduct has been documented in a number of FCC proceedings, most particularly in Docket No. 18509 which led the Commission in 1970 to adopt the existing cross-ownership restriction. The FCC found that telephone companies abused their monopoly power in their service areas by, among other things, attempting to influence the grant of cable television franchises, refusing the holder of a cable television franchise access to the poles and conduits needed for the construction of a cable sytem, requiring unreasonable rates or conditions before permitting pole attachments, pressuring cable television systems into leasing telephone company owned plant rather than constructing their own plant, and attempting to restrict cable systems to the offering of one-way transmission of television signals thus preserving potentially competitive markets for the telephone company. It has been painfully obvious that the telephone companies not only want to be in the cable television business, but they wish to exclude others so they alone control the only wire into the home and business.

Although the FCC attempted to curtail this conduct by the imposition of the cross-ownership ban, telephone companies, still motivated to restrain competition, thereafter utilized the control over access to poles, conduits, and ducts for deterring the development of the cable television business. Indeed, Congress was forced to act in 1978 in order to provide a remedy against these monopolistic abuses by telephone companies. Despite this effort, local telephone companies have continued to attempt to stunt the growth and development of cable television through state regulation of poles and by controlling the timing and scheduling of cable installation and the costs of "make ready."

Although the 1956 Consent Decree precluded AT&T from offering cable television service, this did not constrain AT&T in its aggressiveness toward the cable television industry. They filed tariffs offering to provide cable systems transmission service, which limited cable operators to the most rudimentary forms of cable television service. The BOC's increased pole attachment rates and added impossible conditions to the agreements.

Recent history demonstrates that it is imperative that S. 2172 continue the present cross-ownership ban as to both independent telephone companies and the divested BOC's in order for a competitive marketplace to freely develop.

Unfortunately, Section 605(d) provides for several exceptions to this ban. One would permit the FCC to grant ad hoc permission for a telephone company to provide cable television service in its operating area "upon a sufficient showing that such provision by a carrier will provide significant additional media diversity and competition." This exception must be eliminated. While such an exception on the surface appears fair, through its ambiguity it can offer an enormous opportunity to evade the overall goal of Section 605. Under what realistic and fair situation would such an exemption be defined and how would it then be applied? If an independent cable television operator proposes to serve or is already serving a community, permitting a telephone company to operate a cable system would serve no purpose. Apart from limited rural situations, independent cable operators do or will offer service under reasonable conditions everywhere else. Such an exception could result in permitting a telephone company to overbuild an existing operator, thereby doubling the number of cable systems in the market. Such an exception would also encourage a renewal of past efforts by the telephone companies to thwart independent operators through limiting pole access and close relationships with franchising authorities. If the franchising authority preferred service by the telephone company, for whatever reason, would this be sufficient? Perhaps most importantly, even if the independent cable industry is unable to provide immediate cable service in certain communities for economic reasons, the telephone companies will face the same situation unless they cross-subsidize from monopoly revenues or engage in predatory pricing. Therefore, Viacom believes that the philosophy underlying the exception is misplaced and telephone companies should not be permitted to provide cable television service except in limited rural, low-density areas where independent cable operators are arguably not able to provide the service.

Furthermore, Viacom strongly urges this Subcommittee to prevent the BOC's from providing cable television service under any circumstance. Under the proposed Consent Decree the BOC's would be divested and reportedly reconstituted in groups on a regional cluster basis. As such, they will each become a more immense economic entity than at present. They will be more powerful within their region then even the largest independent telephone companies which are generally spread among smaller communities throughout the country.

Moreover, there are provisions in the proposed Consent Decree which perpetuate special relationships between A.T. & T. and the BOC's for a considerable period of time. The reason for this is to insure that the divestiture goes smoothly; however, this enormous ability to cross-subsidize from monopoly revenues and its continuing relationship with A.T. & T. will give the BOC's an unfair competitive advantage in the provision of cable television service in their service areas. The BOC's, which may be looking for other services to expand their monopoly revenue base, may have even greater incentive to deny or discourage the entry of other entities wishing to provide cable services.

Any limited exceptions retained in Section 605(d) should not apply to the BOC's. It would be ironic indeed if the current Consent Decree, as proposed, prohibited the BOC's from engaging in any mass media and other information services while S. 2172 allowed cable services to be removed from such a prohibition. This would single out cable services as the only mass media or information service offered by the BOC's. Quite clearly, the Department of Justice did not impose such a media diversity exception to the BOC constraints as it applies to newspapers, electronic advertising, or broadcasting, for example. With the shutdown of many major newspapers, such a provision would have been far more justifiable there. Yet the history of BOC abuses and their potential for eliminating other information providers appears to make the risk inherent in such an exception far greater than the potential gain. Here, where competition for access by wire into the home is involved, the BOC's should be totally precluded from offering cable television service in their service areas and no exceptions should exist.

SECTION 605(D): REMOVAL OF RESTRAINTS ON A.T. & T.

Our second concern relates to the inter-relationship between this Bill and the proposed Consent Decree discussed previously. Under S. 2172, A.T. & T. would not be precluded from providing cable television service in a community since it presumably will not be a telecommunications carrier operating in the area once it has legally divested its local operating companies under the proposed Consent Decree. This change from current policy would be a very great error. The divestiture of the local operating companies by A.T. & T. will not lessen the potential for monopoly abuse by A.T. & T., but rather, the emerging cable television and information service marketplace will be fertile ground for A.T. & T.'s proven anti-competitive tendencies.

While it is true that the local telephone exchange service will no longer belong to A.T. & T., new A.T. & T. will retain its monopoly over the delivery of long-line services. Indeed, it has 97 percent of the long-distance market, despite several years of so-called competition. This monopoly will enable the leaner new A.T. & T. to cross-subsidize the offering of competitive information services, including cable television. The new A.T. & T. will still have assets and revenues which far exceed the assets and revenues of the entire cable industry. The ability to subsidize inherent in its long distance monopoly, together with this great economic strength, will place A.T. & T. in a formidable position to engage in anti-competitive practices, many of which the Department of Justice catalogued in its anti-trust case. The post-Decree A.T. & T. would most certainly feel no constraint to avoid engaging in the very types of predatory practices which it was doing with impunity in the past.

In addition, if A.T. & T. is permitted to own and operate cable television systems, it will likely attempt to use these local loop facilities to bypass the local operating telephone companies for the transmission of high speed data and voice services. This will have a negative impact on the local operating companies since it will avoid payment of the extremely important local access charges and give A.T. & T. control again over local loop facilities.

The risks of allowing A.T. & T. into the cable business have no countervailing benefits to justify it. No public need exists and certainly no economies of scale support A.T. & T.'s entry. Furthermore, cable television and the services it provides are in a highly competitive market environment. This market is characterized by a multiplicity of service providers where cable must compete not only with the dominance of the networks, but also with over-the-air television, over-the-air subscription television, Satellite-fed Master Antenna systems (SMATV), multi-channel MDS systems, movie theaters, video discs and cassetts, etc. In addition, direct broadcast systems and low-power television are on the horizon. Information services such as teletext and videotext are provided by any number of entities via television, telephone lines, microwave, satellite, stand-alone computer programs, and various technologies. Thus, cable television lacks monopoly control over any of the services it provides.

If we have learned anything from recent history, it is that once unleashed A.T. & T. cannot be entrusted to compete fairly. The issue is not just the size of A.T. & T., although this is certainly a major concern, but rather the issue is how best to promote competition in the provision of new broadband services to the public. Viacom submits that the divested A.T. & T. must be precluded from entering into the cable television business as well as other mass media services.

SECTION 605(C): MUNICIPAL OWNERSHIP OF CABLE SYSTEMS

The final point on which Viacom wishes to comment is the issue of government ownership of cable television systems. Section 605(c) of the Bill states that any political subdivision which wishes to acquire an ownership interest in an existing cable system must pay "fair market value" to the private owner of that system. As far as the issue of compensation is concerned, we certainly believe that such a provision is important, assuming that this term means the value of a system as a going concern.

Too many systems have found provisions in their franchises which appear to give cities the right to purchase cable television system at book value. This is occurring, for example in the New York City franchising process. Once the cable system has made its investment in plant and assumed all the risks in getting the business going, it is obviously unreasonable to let the city confiscate the system at book value. S. 2172 correctly recognizes this. Moreover, should disputes develop over what the fair market value of a system is, there ought to be provisions for arbitration with judicial review.

But dealing with fair compensation does not resolve the more crucial issue. Section 605(c) implicitly recognizes the right of local governments to become the owners of cable television systems, either initially or via a purchase of existing independent operations. Viacom vehemently opposes the concept of municipal ownership. Many cities seem to be enamored by the economic bonanza that they falsely perceive from cable operation and the resulting ability to augment the city's revenue sources. There are significant economic and other realities which must be considered in any discussion of government ownership.

The construction and operation of cable television systems is an expensive and complex undertaking. Most cable television systems, particularly in large cities, operate at a loss during construction and for extended periods thereafter. For example the two Manhattan cable systems have operated for more than 10 years without showing a profit. Municipalities are going to have to raise money to pay off the debts incurred in constructing the cable systems and to subsidize the period of unprofitable operation. Therefore, a government-owned system must be underwritten out of tax revenues which are paid by all of the citizens of the community, including that portion who choose not to subscribe to the cable system or to all of its services. Since one of the major motives of city ownership is to raise revenues, there would naturally be a reluctance by the cities to maintain state of the art technology and rebuild cable systems as they age. This too costs money, and money used for these activities will be diverted from general revenue funds which could be better used to fund truly essential activities. The use of hard-won revenue from taxes or municipal bonds for the provision of non-essential services is not prudent, particularly in these times when so many vital needs are crying for funding.

From a pure public policy standpoint, governmental ownership of an important communications medium offers a frightening potential for abuse. A cable system could become a political football as one administration defends itself against its challengers who allege mismanagement and/or the suppression of various viewpoints. Cities, more than private entrepreneurs, expose themselves to First Amendment accusations and even lawsuits when they make programming decisions. One only need recall the successful suit against a state-owned public television station in Texas over its decision not to air the film "Death of a Princess." such problems at the local level would likely occur with much greater frequency.

Even if operational responsibilities were placed in the hands of private contractors, as Section 605(c) seeks to encourage, the municipalities will obviously retain control over content, even indirectly. It is not clear whether any such arrangement would prevent the community from choosing to carry one broadcast station or satellite channel over another based on its view of the propriety of the programming. It is the government ownership of the system *per se* which raises the specter of First Amendment abuse. Cable television is a new and growing communications medium, and as such, it should not be in the hands of any government entity, no matter how much insulation has allegedly been built into the control over the "content." As mentioned above, there is no dearth of private entrepreneurs willing to offer cable service. The short-sighted and misguided view of allowing communities to enter the cable television business because of the money-making prospects is not an acceptable rationale for going against the fundamental proposition of the separation of the press and government. S. 2172 should be amended to foreclose government ownership of cable systems.

Again, let me commend you for the general thrust of this legislation. Recognition of the important role which cable television plays in the national telecommunications scheme is long overdue. As part of this effort, we urge you to seriously consider the three modifications to S. 2172 which are discussed above.

Thank you.

Senator GOLDWATER. Thank you very much, Mr. Baruch.

Mr. Henry Geller.

Mr. GELLER. Mr. Chairman, I commend you for your legislative effort to adopt guidelines in the cable field. I think that is necessary. Cable is the coming media force, and I think it is important to establish those guidelines now. Mr. Hauser said it was premature, but if you wait until cable is even more entrenched, to 50 percent penetration or more, you will find it even more difficult then to adopt something.

I agree with you also that the most important issue is the nature of cable on these new, large-capacity systems. That issue involves whether one entity should control the content of all 50 or 100 channels.

I think your bill looks in the right direction in section 606 when it requires nondiscriminatory access on a first-come, first-served basis. That is not an issue of monopoly. In cable homes cable is the only video way into those homes. If, therefore, you get significant penetration of cable—and it is projected to be 50 percent by 1990—the way into those homes will be on cable. And if you do not have access on cable, you are precluded from getting in.

I will give you one example of that. The Times-Mirror Co. began a pay service called Spotlight, and on all of its systems, with 600,000 subscribers, it threw off HBO and Showtime. When HBO and Showtime were thrown off, they did not get into these cable homes by MDS or by other means. They were just cut out of access to those homes, and they are waiting until they will be allowed in again.

So this may be very important for pay services to fully develop. It may be important for DBS pay broadcast to get into these homes, and therefore, I think your provision is a sound one.

Mr. Hauser mentioned that it interferes with the cable system's ability to innovate, to attract capital. I do not see why it should. On a 100-channel system, if the cable operator controls 90 channels, is that not sufficient for innovation to attract capital? Why should not 10 or more be available on a first-come, first-served basis?

The principle here that is so important is the Associated Press principle. That was affirmed by the Supreme Court in the field of newspaper-TV local cross-ownership and said that nothing is more important than that the American people should receive information from diverse and antagonistic sources. That is true of newspaper-TV, and it is true here, that one cable company should not control the access to all the channels.

The big issue is how do you implement this? There is a very difficult question of rate regulation. I would suggest here that you follow a suggestion that Tom Wheeler of NCTA made in a different context, and that is, adopt the scheme of the pole attachment law. Have no rate regulation unless there is a pattern of abuse. If a pattern of abuse is shown, then there can be governmental intervention. Such intervention may be rate-of-return regulation, it may be a fully separated sub as is used in the telephone area, it could be compulsory arbitration, it might be auction, it might be a model that is being used in Boston.

I also agree with your bill in eliminating the applicability of the fairness doctrine and equal time to cable, but that ties in again with the need for leased channel capacity. I think what is wrong here is that concepts from a television of scarcity have been carried over to a television of abundance.

In section 608 of your bill you have specified no liability for libel, obscenity, et cetera, where the cable operator has no ownership connection with the programer. I think that it is a good step, but I would suggest a further qualification, that the cable operator have no right of censorship. By that, I mean he could choose HBO, a distant signal, or whether signal, but would have no power to censor the programs themselves carried on HBO or those signals. That would parallel the political broadcast area then.

With regard to privacy and sports, again I support your legislation. I would suggest that in the sports area, the consent that should be obtained should be that of the league or the originating team rather than the home team, but I do not think it matters that much. The reason I say that is that the teams have to follow league rules. But I think it would be better symmetry.

With regard to the ownership provision, I agree that there should be no limitation now on the number of systems and number of subscribers, but I do suggest that the Associated Press principle is applicable here, and you should have no local cross-ownership of cable and broadcasters, that Cox, for example, should not own a cable system in the same area where it owns a TV station. That does not prevent the broadcaster from investing in cable. Broadcasters are the largest owner of cable, one-third owners, but they should go elsewhere, not in the same area in which they own a TV station.

Thank you.

Senator **Goldwater**. Thank you, Mr. Geller.

Mr. Tarshis, you will be next.

Mr. **Tarshis**. Thank you, Mr. Chairman, Senator Goldwater.

I am the director of the Bureau of Franchises of the city of New York. We welcome this opportunity to submit some comments, which we have done, to the staff.

The city has been involved in franchising and regulating cable television systems since 1965 when it authorized two companies to construct cable systems to serve the Borough of Manhattan. The city is currently in the process of negotiating franchise agreements with the remaining four boroughs of the city—namely, the Bronx, Brooklyn, Queens, and Staten Island. The systems to be constructed in these four boroughs will have the potential of serving over 2 million households, with a full array of services over the most sophisticated broadband communications system that would be developed anywhere in the United States.

My statement in total is submitted to you. I would like to make some comments as to the various sections of the proposed legislation, and then be available for any questions you may have.

Henry touched on section 603 a moment ago, the statement of authority of Federal preemption, I believe. Several years back Dean Birch, while he was Chairman of the Federal Communications Commission, had created a Federal, State, and local advisory council which I had the privilege of serving with him on, and this very question was then discussed. I would urge the committee to seek that record and to determine what we all then felt at the real early stages of cable as to the role of the Federal Government. Generally the feeling was that the Federal Government did have a role to play, and that there should be some legislation in order to insure universal minimum standards so that all systems could have the capability of being interconnected and truly create the broadband communications system that we envisioned then and still envision now for the cable industry.

Certainly we believe that Federal areas of preemption in this area are appropriate, but only with minimum—and I stress minimum—standards leaving the various communities, and have the standards that meet the needs of the communities based upon the need and based upon the public desire to utilize the system.

As to ownership, section 605, obviously it is Congress right—and I do not know whether they should or should not, it is a judgment they should make—to determine whether foreign ownership of cable systems is appropriate or inappropriate. I certainly think Congress must answer that. But certainly as far as the cities are concerned, the cities certainly have an interest in determining who will run our cable systems. I think we have an obligation to our citizens and to the rest of the country to ascertain whether those persons or companies that come forward are qualified financially, morally, and otherwise to own those systems.

To that extent, certainly the cities have an interest in creating some oversight as to whom franchises should be awarded to.

As to cities owning systems themselves I have serious problems with both aspects of that. The city of New York does not intend and hopes it does not have to build, its own cable system. We would prefer private ownership, and we are moving in that direction.

But there is a possibility that some areas of our city may not be franchised because the cable industry may not consider that to be financially desirable to them. You cannot leave a void when you build a city as large as the city of New York where an area remains uncabled while every other area is cabled. So that extent, certainly the city may have to look to some construction.

Second, the question of paying fair market value. The bill is unclear. Do you pay fair market value to a company who abandons the system? Do you pay fair market value to a company that materially breaches the contract? Do you undertake an obligation to evaluate fair market value? Under what set of standards? Is it depreciated book value? Is it a formula you can help us to develop? Or do we leave it total discretion?

It is a very difficult thing for us, particularly in the city of New York, where our very charter specifically states that there shall be no value for the franchise itself in determining the value of franchise systems. So these are very serious elements which we must address.

As to the general capacity of section 606, we certainly recognize the need for minimum standards. What is presently in the bill may appear to be sufficient today, but we do not know what the demand is going to be. And as Henry pointed out a moment ago, I think that should be left to the local communities so as to expand on the basis of what the actual needs are.

I see the red light is on. I would have hoped to be able to go on and mention a few others. Just let me go to two items, if I may beg your indulgence—three other items.

One is the franchise fee. We have a franchise fee in the city of New York since 1961, of 5-percent. We are negotiating a franchise contract now. We are still talking 5 percent. It is 1982. I think we are doing it, recognizing that it is the kind of industry that has to come in and make a major investment.

Certainly, everybody here talked about inflation as far as the cable companies are concerned. Inflation affects a city. If a 5-percent franchise fee was appropriate in 1961, in 1965, in 1970, it probably should be 125 percent today if you wanted to use the inflation factor. But cities are not grasping and grabbing. I think the record, if you search it, is just the reverse. We do want the cable systems. We want good cable systems built. And we are not greedy.

Two final items which the bill does not refer to. One is, I believe, a concern which you may wish to address. That is the question of granting immunity to cities in dealing against antitrust problems in dealing with the franchising problem in connection with cable TV. Many cities are frightened of doing it. We do not believe that in the city of New York we have that problem, because we have State regulation and laws which give us that exemption, I believe.

The other is the question of access to buildings by private owners in the urban center by the cable companies, and we are running into problems where the owners are refusing permission of access. That is an area that I would hope the committee would look at. Thank you for permitting me a few minutes longer.

Senator **GOLDWATER**. Thank you very much. Your entire statement will be made part of the record.

[The statement follows:]

STATEMENT OF MORRIS TARSHIS, DIRECTOR, BUREAU OF FRANCHISES, CITY OF NEW YORK

I am Morris Tarshis, Director of the Bureau of Franchises for the City of New York. With me here today is Hadley Gold, the City's First Assistant Corporation Counsel. On behalf of the City of New York (the "City"), we welcome this opportunity to submit these comments on S. 2172. We respectfully request that these comments be made part of the record.

The City has been involved in franchising and regulating cable television systems since 1965, when it authorized two companies to construct cable systems to serve the Borough of Manhattan. The City is currently in the process of negotiating franchise agreements for the remaining four Boroughs of the City—The Bronx, Brooklyn, Queens, and Staten Island. The systems to be constructed in these four Boroughs will have the potential of serving over two million households with a full array of services delivered over the most sophisticated broadband communications systems that will be developed anywhere in the United States.

The City hopes that our comments, based on years of experience gained in cable franchising and oversight, will be useful to the Subcommittee in evaluating S. 2172.

I. SUMMARY

We believe there should be a federal cable communications policy to protect the nationwide public interest. Further, we believe that the public interest can best be protected through the adoption of a set of minimum standards by the Federal Communications Commission ("FCC") that would ensure a common base of services throughout the country. We do not believe that the approach taken by S. 2172, which places exclusive jurisdiction in the FCC with respect to a number of cable related issues, is the appropriate means to foster a national cable communications policy.

We do not believe that the cable television industry is in an infant stage. Although the full range of its services is still developing, we believe it is an industry that does not warrant the types of protections inherent in an *ad hoc* system of federal preemptions.

Cable television is both national and local. Many of the programs offered to subscribers are available on a nationwide basis; thus, the national character of cable television. However, because of cable television's use of our streets, its ability to bring communities together through narrowcasting, and its potential to provide a myriad of public services that are unique to each location, we believe that cable television is primarily a local communications resource.

Thus, we believe that many of the issues addressed by S. 2172 in the form of federal preemptions should be left to local decisionmaking. Proceeding from a set of minimum federal standards, local authorities, in conjunction with cable operators, are well-qualified to judge and fashion local solutions to issues such as allocation of channel capacity to public, educational, governmental, and leased programmers; level of franchise fees; protection of subscriber privacy; technical standards; and the terms under which a municipality can acquire a cable system. The establishment of minimum federal standards in these and other areas would permit jurisdictions directly involved in and affected by cable service to achieve more rigorous protections in such matters where appropriate.

Further, local jurisdictions should have the unrestricted right to negotiate reasonable franchise fees with cable operators. The local streets which cable operators use are a valuable resource. Localities should be able to determine a fair price for the use of their resources.

Finally, the City believes that Congress can assist the cable industry by addressing several issues of concern to municipalities and cable operators. At the end of my testimony, I will advance specific recommendations for congressional action with respect to two key areas, not covered by S. 2172, which directly affect the growth and development of cable telecommunications.

The City has prepared detailed comments on each section of S. 2172 and a set of those comments is appended to this testimony. In the balance of this statement, I would like to share with you some of our observations regarding cable television, which we have developed as a result of over 15 years of cable franchising and oversight activity, and to highlight some of our principal concerns regarding the Bill.

II. LOCAL JURISDICTIONS SHOULD BE ABLE TO ESTABLISH FRANCHISING STANDARDS CONSISTENT WITH FEDERAL MINIMUM STANDARDS

Cable television today is a thriving multi-billion dollar industry with favorable prospects for continued growth. In 1980, the industry's operating revenues totaled $2.2 billion, representing an increase of 23% over 1979 revenues.[1] The dominant forces in the industry today are affiliated with, and have access to the capital reserves of, major U.S. corporations. The complexion of the industry has changed radically since 1972, when the FCC first adopted a comprehensive set of cable television rules.[2] The industry no longer requires the protections afforded the fledgling cable business of 10 years ago.

The City endorses the establishment of a national policy on cable television to ensure that cable television systems across the country meet certain minimum standards to protect the public interest and to encourage the continued growth of cable television. As the "Findings" section of S. 2172 indicates, there is a national interest in the development of cable television as an integral part of the nationwide communications system. To date, uncertainty as to the boundaries of federal jurisdiction with respect to cable has hampered the development of a sustained, wide-ranging policy on cable television at the national level. To remove this uncertainty, the City believes that Congress should enact legislation making clear that the FCC has jurisdictional authority to adopt rules and regulations in the form of minimum standards in those areas affecting the national interest in cable, as determined by Congress.

Local jurisdictions should be able to protect their interests in cable television

Local jurisdictions also have a fundamental interest in and are intimately affected by cable television. Cable operators must use one of the single most valuable resources of local jurisdictions—their public streets and thoroughfares—in order to construct, operate, and maintain cable systems. Cable systems also have tremendous potential for the delivery of a broad range of public services, including municipal services, health care services, and public education. In addition, cable will expand dramatically the outlets available for local community expression and will encourage the production of locally oriented programming. With the development of sophisticated interactive services, such as home banking, home shopping, opinion polling, home security, information retrieval, and teleconferencing, cable will alter radically the manner in which local residents interact with each other, their institutions, and their local governments. Given the extent to which cable impacts on local jurisdictions and their residents, local jurisdictions should have the flexibility to formulate laws, regulations, standards, and policies consistent with the public interest.

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[1] These figures were reported in "Facts and Figures—Cable Industry Revenues Soar 23 Percent in 1980, FCC Reports," *Cablevision*, February 15, 1982 at 73.

[2] *See Cable Television Report and Ord* , 36 F.C.C. 2d 143 (1972).

The New York City franchising process

The City firmly believes that local jurisdictions have an obligation to grant cable franchises only on terms and conditions that protect the needs and interests of the residents and institutions of their jurisdictions. Throughout its current franchising process for the four Boroughs, the City has devoted a great deal of time, effort, and resources to identifying local needs and interests and to determining how best to serve them. Over a year-long period, the City held regular meetings, open to the public and franchise applicants, to review, in detail, the wide range of issues pertinent to current, state-of-the-art cable television systems. That process followed another year-long procedure whereby governmental subdivisions of each Borough (referred to as Community Board Districts) had reviewed all of the cable applications and the City's cable consultants had completed an in-depth study of cable television. In compliance with state cable regulations and City Charter requirements, the City has also held meetings at which the public and cable applicants were present and given the opportunity to make their views known to the City's franchising authority. Throughout the franchising process, the City has sought, received, and considered public participation.

The City's franchising process is currently being guided by the following objectives and requirements for the cable systems:

A common universal service package available throughout the City and high penetration of other basic subscriber services at the lowest possible cost;

Broad diversity of services available uniformly throughout the City;

Widespread use of cable programming, access, and related communications services by City residents, departments and agencies, institutions, businesses and others;

Technically sound and flexible cable television systems constructed in a timely fashion;

Economically viable cable franchises; and

Efficient and effective oversight and regulatory mechanisms.

The City believes that the process which it has followed for the Boroughs of The Bronx, Brooklyn, Queens, and Staten Island will produce healthy, viable systems responsive to the needs of local residents and institutions and will serve as a model for franchising throughout the country. A key to our involvement is to ensure that this vital communication resource will be available to all of the City's residents.

It merits emphasis that New York State has a comprehensive cable regulatory statute,[3] which expressly authorizes municipalities to grant franchises to cable operators and requires cable operators to be franchised by the municipalities they serve.[4] The statute, adopted in 1972, establishes the State Commission on Cable Television ("CCT"), defines the CCT's operating responsibilities, and establishes standards and procedures for cable franchising. The general approach of the statute is to prescribe minimum standards which may be exceeded in particular municipalities, unless the local standards are inconsistent with state requirements.[5]

The bill should authorize the FCC to establish minimum standards only

Given the legitimate interests of local jurisdictions in cable television, and the need for some degree of nationwide uniformity, the City respectfully suggests that the basic thrust of S. 2172 should be reformulated. In order to accommodate local and national needs within the framework of federal legislation, the Bill should (1) make clear that FCC jurisdiction with respect to the matters dealt with in the Bill is *not* exclusive; (2) establish, or authorize the FCC to establish, *minimum standards* applicable to all cable systems in the nation; and (3) provide that additional standards in excess of federal minimums may be established at the local level.

The current language of S. 2172 is confusing with respect to the jurisdictional authority of the FCC vis-a-vis that of local jurisdictions. Section 603(1) of the Bill, entitled "Statement of Authority," seems to suggest that, if the Bill authorizes the FCC to act in a particular matter, or if the Bill addresses a particular matter, no state or local jurisdiction can make any rules or policies with respect to those matters—whether or not such rules or policies are inconsistent with the federal standard. On the other hand, Section 603(3) might be read to permit states and local jurisdictions to take action in any area provided that such action is not "inconsistent with" federal laws or regulations. If the Bill is intended to substitute federal policy for all local decisionmaking regarding the matters in the Bill, the City respectfully disagrees.

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[3] The statute is codified as Article 28 of the New York Executive Law.

[4] N.Y. Exec. Law § 819(1), (2) (1981 Supp.).

[5] *See* N.Y. Exec. Law § 819(3).

The federal government should not adopt any policy or law that would preclude local jurisdictions from pursuing legitimate interests in negotiations with cable operators and in the regulation of cable systems. The public is not well-served by federal restrictions on their local government's ability to negotiate cable franchises on terms consistent with local needs and conditions. The federal government can ensure a level of national uniformity among cable systems and can protect the interests of subscribers by adopting minimum standards for all cable systems in the nation. The minimum standards approach, together with a non-preemption policy, would permit flexibility at the local level and, at the same time, would guard against unacceptable levels of service in different parts of the nation.

As described more fully in the attached Section-by-Section Analysis, the Bill addresses issues that local authorities, together with cable operators, are well-qualified to judge and resolve. In almost every circumstance, local conditions will affect the proper standards that should be applied. However, the Bill, through its preemption policy, appears to prohibit localities from making any judgments in these areas and to impose standards that may not be suited to particular local needs.[6]

The City has detailed its objections to specific provisions of the Bill in the Appendix attached to these comments. I would now like to highlight some of the City's principal objections that are based on the Bill's preemption policy and establishment of fixed standards.

Municipal ownership.—A municipality should have the right to negotiate with a cable operator in a business-like manner to agree on the terms and conditions under which the municipality could own, or acquire an ownership interest in, a cable system.[7] The Bill's mandate in Section 605(c) that local jurisdictions acquire ownership interests only at fair market value unduly restricts franchising authorities in their negotiations. The give and take of the negotiating process—not the federal government—should determine the price of municipal ownership.

Furthermore, fair market value is an inappropriate measure of payment in a number of instances. A municipality should not be required to pay fair market value for the system if the cable operator has abandoned the system or otherwise failed to perform its contractual obligations.

Cross-ownership restrictions.—Local jurisdictions should have the right to continue in effect policies which promote competition and diversification of control of the media. The Bill guts existing FCC rules on ownership of cable systems by other communications interests.[8] While the City supports the underlying policies of the FCC rules, the City would not oppose the elimination of those rules, provided that the Bill would permit the City to enter an agreement with a cable operator containing substitute ownership restrictions for competitive and diversification purposes. Congress should not hasten the trend toward concentration in the communications industry by repealing FCC ownership restrictions and, at the same time, tying the hands of local jurisdictions to act in this area.

Dedication of channel capacity.—Franchising authorities and cable operators should be able to agree upon the channel capacity available for public, educational, governmental, and leased uses. Section 606 of the Bill appears to fix percentages of total capacity dedicated to the foregoing purposes. Fixed percentages have the dual disadvantage of (a) being arbitrary and not suited to the particular needs of localities, and (b) becoming outdated within a short period of time. For example, because of the City's vast array of civic groups, institutions, community groups, and media interests, the City has a substantial need for public, educational, governmental, and leased capacity. The channels allocated for the foregoing purposes should not be determined solely by system capacity and should not be decided arbitrarily on a national level.

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[6] The City recognizes that it is entirely appropriate for the FCC to have exclusive jurisdiction to determine the conditions under which foreign cable operators may do business in the United States. (*See* Section 605(b).)

[7] The Bill should make clear that local jurisdictions may own, construct, and operate a *new* cable system, as well as acquire an ownership interest in an existing system.

[8] Only "telecommunications carriers" are subject to a cross-ownership restriction, which may be waived by the FCC. (Section 605(d).) By excluding broadcasters from the definition of the term "telecommunications carriers" (Section 604(15), the Bill repeals existing FCC restrictions on ownership of cable systems by national television networks and local broadcasters in the service area. (*See* 47 C.F.R. § 76.501 (1981).) It should be noted that the Bill is absolute in its prohibition against the authority of local governments to regulate ownership of cable systems. The City assumes that this provision would not prevent franchising authorities from examining the character and fitness of cable applicants to construct and maintain a cable system. The legislative history of the Bill should make this clear, if the provision is not amended.

Carriage of broadcast signals.—The mandatory carriage rules of the FCC require cable operators to transmit local over-the-air signals on their systems. The City supports these rules and believes that they should be preserved. However, at present, subscribers bear the cost of these carriage rules since the broadcasters are not required to pay their fair share of the cost of carrying local signals on the cable systems. While we believe that further study of this issue is appropriate, we would support a requirement that broadcasters be expected to pay cable operators for such carriage in order to void the indirect subsidy of commercial operations which now results from the FCC rules. Of course, any such charges would have to apply to all broadcasters on a nondiscriminatory basis.

Access to the system.—Section 610 of the Bill expressly exempts cable operators from federal requirements concerning the fairness doctrine, equal time, and reasonable access. The City would not oppose this provision if the Bill permitted local jurisdictions to adopt appropriate and reasonable standards designed to achieve the underlying policies of those requirements. If abuses develop such that reasonable access to the system is consistently denied or is unavailable, local jurisdictions should be able to intervene to correct the situation.

Franchise fees.—Section 611 of the Bill authorizes the FCC to establish limitations on the amount of the franchise fee which cable operators pay to state and local jurisdictions. The City believes that the franchise fee to be paid for the use of City streets is a matter for negotiation between the City and cable applicants. The streets of the City are a valuable resource and the City should have the right to obtain a fair and reasonable price for their use. The federal government should not preclude the City from negotiating in good faith reasonable franchise fees from cable operators.

Section 611 appears to contemplate that the FCC will fix more than one fee ceiling, which suggests that the ceilings may vary between different states or cities. If the FCC adopts a sliding scale for franchise fees, the FCC would be in a position of evaluating local conditions—such as the value of the streets, services to the public, and the regulatory program that the locality intends to implement—in order to determine the appropriate fee. The City believes that local jurisdictions are in a far better position to make such evaluations and judgements.

A fixed federal franchise ceiling applicable uniformly to all jurisdictions would offer no better solution, for the same reasons that local jurisdictions have different needs and requirements, which they are well-qualified to determine.

It is difficult to understand the rationale for authorizing the FCC to adopt any type of ceilings at this particular time. Based on the FCC's experience with existing fee limitations, the FCC initiated a proceeding to consider the repeal of the restriction over three years ago. At that time, the FCC publicly stated that "there remains serious question about . . . the desirability of a federal limitation on franchise fees."[9]

Clearly, the make-up of the industry has changed dramatically since the FCC first determined to impose its fee limitations. The concept of fee ceilings grew out of a desire to protect an infant cable industry from the unreasonable demands of franchising authorities. Without such protection, it was argued, the industry would be drained of the necessary capital to ensure its growth. Today, cable is no longer in the incipient stages of its development. To be sure, the industry is still maturing. However, major U.S. corporations are now heavily involved in and are the leading interests in, the industry. Cable no longer needs the protective barriers erected by the federal government a decade ago.

III. RECOMMENDATIONS REGARDING NATIONAL POLICY ACTION

As noted above, we concur with the basic objective of the Bill—to establish a national policy for cable telecommunications in order to foster the growth and development of cable as a medium which is responsive to and serves the needs and interests of the public. Throughout the past 15–20 years, this objective has been carried out through a careful balancing among the legitimate interests of each level of government which is involved in the franchising and regulation of cable systems. We firmly believe that this relationship must be preserved if the basic objective is to be achieved. As presently drafted, however, the Bill would severly damage that relationship by usurping from state and local governments—and placing exclusively in the federal government—the right to protect local interests in several critical areas.

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[9] 71 F.C.C. 2d 569 at ¶ 34 (1979).

Accordingly, while we do not question the need for a national policy, we object to the manner by which the Bill would implement that policy. Moreover, we believe that, if a national policy is to be established, it must be one which protects the interests of each of the participants engage in fostering the growth and development of cable television.

In that regard, we would recommend that the bill be modified to cover two additional subjects which directly affect cable television's growth and development. The first affects municipalities engaged in cable franchising—the first necessary step in the development of cable service in any area. The second affects the cable operators, and their right and ability to serve subscribers—particularly subscribers in urban areas. These two subjects are: (1) the antitrust liability of municipalities, and (2) the access of cable operators to multiple dwelling units.

In order to provide service in any area, the cable operator must secure from the local jurisdiction the right to use and occupy the public streets. In addition, in urban areas, the cable operator must secure from private property owners the right to enter private buildings. Two pending lawsuits directly impact upon these two fundamental rights. It is likely that congressional action may be necessary with respect to both of these suits.

Antitrust immunity—The Boulder decision

As a result of the Supreme Court's recent decision in *Community Communications Co., Inc.* v. *City of Boulder,*[10] municipalities are now faced with the threat of lawsuits on antitrust grounds challenging municipal franchising actions. In *Boulder,* the Court held that an ordinance passed by the Boulder City Council was not exempt from antitrust exposure since the municipal ordinance did not constitute action of the State of Colorado or action in furtherance of a clearly articulated and affirmatively expressed State policy. There was no Colorado law governing cable television regulation.

The threat of antitrust suits plainly interferes with the ability of cities to conduct a franchising process and reach decisions that are fair, make economic sense, and are consistent with the public interest. There are many competing interests and trade-offs in determining how, and to whom, a cable franchise should be granted, and local officials must strike a balance between these interests. If cities are exposed to antitrust liability, there will inevitably be lengthy and prolonged delays in the availability of cable service to subscribers.

The City believes that the *Boulder* decision requires congressional action. Municipalities that are acting pursuant to specific state statutes or directives may not be subject to antitrust suits, because of the state action exemption under the antitrust laws. The pattern of state cable statutes authorizing municipal franchising is irregular, however, and the majority of states do not have protective legislation for municipalities.

There can be no question that achieving the basic objectives of S. 2172 requires that *all* municipalities be permitted to engage in an orderly and rational franchising process without fear of antitrust challenge. Congress should adopt legislation expressly exempting municipal franchising actions from the antitrust laws.[11]

Access to private buildings—The Loretto case

Throughout the country, and particularly in urban areas like New York, cable operators who wish to provide service requested by residents of multiple dwelling units have been forced to accommodate landlords and other property owners who demand that the operators pay them a fee or make other special concessions in exchange for access to their property and installation of cable facilities on their property. Such demands plainly interfere with the ability of cable operators to serve residents in multiple dwellings.

On March 30, 1982, the Supreme Court heard arguments in the case of *Loretto* v. *Teleprompter Manhattan CATV Corp.*,[12] which involves a challenge by a New York City landlord to a New York State law and regulatory scheme which permits access by cable operators to multiple dwellings, over the objections of the building owner, through the payment of a nominal amount to the owner. To date, the New York State courts have upheld the law and regulations on the grounds that they foster a legitimate public policy—the growth and development of cable television. Indeed, in large urban areas, access to multiple dwellings in a manner consistent with that law can be the single most important factor affecting the feasibility of providing cable service.

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[10] 102 S. Ct. 835 (1982).

[11] Of course, the exemption should not and would not apply in circumstances in which there is evidence of improper influence on local decisionmakers.

[12] 440 N.Y.S. 2d 843 (N.Y. 981), *prob. juris. noted,* 50 U.S.L.W. 3300 (October 19, 1981) (No. 81-244).

It is uncertain how the Supreme Court will rule on this issue. However, in order to eliminate the uncertainty, and to ensure that there is a uniform national standard, the City recommends that the Bill either incorporate provisions similar to the New York law or otherwise confirm the ability of state or local jurisdictions to establish reasonable restrictions on the ability of multiple dwelling owners to extract payments or other concessions from cable operators as a condition to providing requested service to the residents of such buildings.

IV. CONCLUSION

The City believes that the current philosophy of the Bill—federal preemption and substitution of federal policy for local decisionmaking—presents fundamental, practical difficulties for the effective regulation of cable television in the public interest. Cable television is an essentially local service to local residents using local streets and pathways. When the needs and interests of local residents have not been considered or protected, or when a problem arises with respect to cable service, subscribers contact their local authorities, not the federal government. Local authorities are in the best position to receive and take action on subscriber complaints, to ensure that cable systems comply with applicable standards, and to establish those standards. To place all decisionmaking in the areas dealt with in the Bill within the exclusive province of the federal government would play havoc with the regulatory framework that is most appropriate for cable television. The City urges that, as congress decides to take action in this area, it do so by adopting minimum standards that would not interfere with the ability of local jurisdictions to negotiate terms and conditions for the protection of their residents and institutions.

Thank you.

[APPENDIX]

SECTION-BY-SECTION ANALYSIS BY THE CITY OF NEW YORK OF PROPOSED CABLE TELECOMMUNICATIONS ACT OF 1982 (S. 2172)

The City of New York submits the detailed comments set forth below concerning the substantive provisions of S. 2172. The City would be pleased to discuss its comments further with particular staff members and to submit suggestions for specific language changes in the Bill.

GENERAL

1. The City endorses the proposition that there should be a federal cable communications policy to ensure some level of commonality among cable systems and to protect the nationwide public interest. In particular, the City supports the principle that there should be dedicated leased capacity and dedicated capacity for public, educational, and governmental uses on all cable systems. However, the City believes that national policy goals can best be achieved through the adoption of minimum standards by the FCC—not by placing exclusive jurisdiction in the FCC with respect to many cable matters. The establishment of minimum standards would permit jurisdictions directly involved in and affected by cable service to achieve more rigorous protections where appropriate and, at the same time, would ensure the protection of subscribers.

a. The only area dealt with in the Bill that is an appropriate matter for exclusive federal jurisdiction concerns the terms on which foreign operators may do business in the United States. (§ 605(b).)

2. The Bill seems to be premised on the notion that cable is still an infant industry in the incipient stages of its development. The facts do not bear out this proposition. The dominant forces in the industry today are affiliated with major U.S. corporations. In recent years, the FCC has taken affirmative action to lessen its regulatory role with respect to cable in part because of the industry's explosive growth over the past decade. It seems anomalous that Congress would now direct the FCC to take a more active role in some matters, thereby substituting federal regulation for the proper give and take between cable operators and the jurisdictions whose streets are being used to provide services to the residents and institutions within those jurisdictions.

Section 603. Statement of authority

1. The language of § 603(1) and § 603(3) is confusing with respect to the extent of the jurisdiction of the FCC and local authorities. While § 603(3) suggests that local authorities may take action not inconsistent with the provisions of the Bill, § 603(1) suggests that local authorities are preempted from making any decisions regarding matters dealt with in the Bill. The City is opposed to a policy of preemption and believes that local authorities should be able to negotiate stricter standards than provided in the Bill, if such standards are reasonable and justified by local conditions.

2. The language in § 603(3) of the Bill is unclear as to the effect the Bill would have on existing ordinances and contracts governing the relationship between franchising authorities and cable operators. The Bill seems to suggest that ordinances or contracts containing provisions inconsistent with the Bill would have to be modified or revised. This is patently unfair to local franchising authorities that have engaged in good-faith negotiations and, in reliance thereon, have granted a franchise subject to the terms and conditions agreed upon by the parties.

Section 604. Definitions

The City's comments on particular definitions are made within the context of the specific provisions to which the definitions are most relevant.

Section 605. Ownership and control of cable systems

1. The City opposes the prohibition on adoption of cross-ownership standards by local authorities. (§ 605(a).) By excluding broadcasters from the definition of "telecommunications carrier" (§ 604(15)), the Bill removes existing FCC restrictions against cable ownership by major networks and local television stations in the service area. (47 C.F.R. § 76.501.) The Bill would continue the cross ownership restrictions only with respect to telephone companies, unless the company could show that it would provide significant media diversity and competition. Especially since the Bill significantly guts existing FCC rules, local authorities should have the right to choose whether they wish to continue a policy that promotes competition and diversification of control of the media. There is already concentration in the broadcast industry. Fewer and fewer big cities today have more than one or two major newspapers. The cable industry itself is increasingly dominated by a small group of multiple systems operators. The Bill should not hasten the trend towards concentration in communications by eliminating existing FCC restrictions and, at the same time, barring local authorities from adopting substitute cross-ownership rules.

a. Although the prohibition on local regulation of system ownership seems to be absolute in § 605(a), the City assumes that this provision would allow franchising authorities to review the qualifications, character, and fitness of cable applicants to own, construct, operate and maintain a cable system. The legislative history of the Bill should make this clear.

2. The City is opposed to the requirement that local authorities own, or acquire an ownership interest in, a cable system only at fair market value.

a. A municipality should have the right to negotiate in a business-like manner with a cable operator and agree on the terms and conditions under which the municipality could acquire an ownership interest in the cable system.

(b) There are circumstances in which it may be inappropriate for the municipality to pay an amount equivalent to some notion of "fair market value." For example, if the system is abandoned by the cable operator or the cable operator commits a material breach of his franchise contract or materially violates a provision of the cable ordinance, the municipality should not be required to pay the operator fair market value for the system.

c. In any event, the Bill raises far more questions than it answers. The Bill does not define "fair market value," which is a vague and indefinite concept. For example, does fair market value include the value of the franchise? Can franchising authorities and cable operators define fair market value to be a specific price set forth in the franchise agreement? How does the concept of fair market value apply to a joint venture situation in which part of the municipality's contribution to the joint venture may be access to and use of city streets? Undoubtedly, the Bill's prohibition would spawn countless legal challenges as to what constitutes payment of "fair market value" by a municipality.

d. The payment of fair market value may present legal problems for some municipalities. For example, the City is subject to a Charter provision prohibiting it from compensating a franchisee for the value of the franchise.

3. The Bill should make clear that local authorities may own, construct, and operate a *new* cable system, as well as acquire an ownership interest in an existing system.

4. The City does not believe it is necessary to include in the Bill a provision prohibiting local control over programming except on the public, educational, and governmental channels. (§ 605(c).) This provision is far too restrictive and might be interpreted to prohibit local jurisdictions from taking any actions which may affect programming. The Constitution provides protection against unreasonable governmental interference with freedom of speech. Of course, local jurisdictions would operate their systems and structure their ownership arrangements in a manner that would be consistent with the First Amendment.

Section 606(a). Dedication of channel capacity

1. The City supports the proposition that cable operators should allocate a portion of the system's capacity to public, educational, governmental, and leased uses. The availability of channel time for lease is necessary to ensure that there is competition in the delivery of services to subscribers. The availability to channel time programmed by public, educational, and governmental entities permits the development of programming in the public interest.

2. However, the City does not believe that Congress should fix absolute percentages of total channel capacity for the foregoing purposes. Fixed percentages are arbitrary and are not tailored to meet the needs of a particular community. Moreover, precise numbers fixed by legislation can become outdated in a short period of time. The City believes that the dedication of channel capacity for the specified purposes may be an appropriate area for minimum federal standards. Local jurisdictions and cable operators could agree on greater channel capacity dedicated to the specified purposes as appropriate.

a. By using fixed percentages to determine channel allocations, the size of the system is the sole determinant of capacity available for the specified purposes. However, the "right number" of channels does not depend solely on the total capacity of the system, but also on the demographics and size of the franchise area, the number of independent service providers seeking access to subscribers, types of services to be provided, and other factors which will vary from locality to locality. Similarly, the number of channels that should be dedicated to public, educational, and governmental uses will depend on the types of institutions and groups in the community, their interest in cable programming, and the local government's interest in developing programming for the public.

i. The City, for example, is interested in developing innovative programming for distribution to the public and in experimenting with cable as a means of providing services in the public interest. In addition, the City has countless cultural, civic, community, and media groups that want access to the system. The City has a substantial need for leased, public, educational, and governmental channels. Under the Bill's provisions, the City could have available to it no more channels than any other city whose system has similar channel capacity.

b. The percentage approach leaves no room for subsequent expansion. Many of the factors that will affect the need for channels can only be measured after the system has been operating for a period of time. The goal at this point should be to ensure flexibility so that, if demand for channel time in a particular locality outstrips supply, there is a mechanism for increasing channel capacity dedicated to public, educational, governmental, and leased uses.

c. Local conditions will determine the need for leased, public, educational, and governmental channels. This is a prime example of a local matter that should not be within the exclusive jurisdiction of the FCC.

3. The City suggests that the Bill should not mandate that public, educational, and governmental channels be made available on a "first-come, first-served" basis. (§ 606(c).) The City suggests that the Bill require availability of such channels on a "reasonable" basis to permit some flexibility in program scheduling. The City believes that such flexibility is necessary in order to promote the production of quality programming and apportion fairly among users the available capacity for public interest and leased services.

4. The cable operator's obligation to provide leased access should not cease because there may exist—in the minds of particular commissioners at a given time—alternatives to the cable system. Leased channel users may build up an audience or a subscriber following for their services on the cable system. Leased users should not then be denied access to the cable system merely because there is evidence of competition from other service providers. (*See* § 606(b)(1), (2).) This provision would appear to discourage, rather than promote, effective competition.

5. In any event, it should be recognized that the existence of alternative services is not a realistic measure of their availability to subscribers. Once a subscriber obtains cable service, the subscriber generally resists paying another set of fees for a different type of service (*e.g.*, satellite services) that offers similar types of programming. Therefore, denial of leased user access to the cable system may deprive subscribers of receiving the type of programming offered by that leased user.

6. The City recognizes that all reasonable steps should be taken to avoid waste of resources on the cable system. However, the cable operator should not have the option of requiring that programming by public, educational, governmental and leased users appear on a single channel until there is a demand for a particular type of channel on a full-time basis. (*See* § 606(d).)

a. Subscribers should be able to identify a particular channel with a particular type of use. It is easier to attract and retain an audience if, for example, subscribers know that, on Channel A, programming by the municipal government will appear, on Channel B, programming by access users will appear, on Channel C, programming by leased users will appear, etc.

b. Some of the users which the Bill lumps together may be incompatible with each other and should not appear on the same channel. For example, the local government should not have to share a channel with leased users, which may be providing adult programming.

c. There is a risk in permitting dedicated channels to be used for other purposes until such time as the channels are needed for their dedicated use. During the interim period, the cable operator may schedule programs such that it is impractical or politically infeasible to recapture the channel time.

Section 607. Rate regulation

1. The City supports § 607(a) which permits local authorities to regulate rates for the use or sale of channel time on the public, educational, or governmental channels. It shold be made clear, however, that local authorities may expect cable operators to provide such channel time at no charge.

2. With respect to basic service regulation, the City objects to the definition of "basic service" in § 604(1) as the retransmission of broadcast signals and "any other service as determined by a cable operator." This provision places sole discretion in the cable operator to determine what services constitute basic service, other than broadcast signals. The effect of the definition of basic services under § 604(1) and the rate regulation provisions of § 607(b) may be to limit local authorities to regulating the rates for retransmission of broadcast signals. This limitation would severely restrict the ability of local authorities to provide that a wide range of basic services is available to a broad spectrum of subscribers at a reasonable price.

3. The City suggests that § 607(c) be modified to permit local authorities to regulate rates charged leased users to ensure (1) that cable operators do not charge excessive rates which would discourage the use of leased capacity, and (2) that leased rates are applied on a non-discriminatory basis.

Section 608. Criminal and civil liability

The City suggests that this Section's exemption of cable operators from certain liability should be based on the operator's role in program production, not on the particular channel over which a program is distributed. Specifically, § 608 should be modified to make clear that cable operators or their affiliates may incur liability if they have produced, or have exercised editorial control over, programs distributed on a leased, public, educational, or governmental channel. However, the liability exemption would continue to apply if the cable operator assisted access users in technical production aspects of access programs. Section 608 should not preclude cable operators from assuming by agreement greater liability than that permitted by the Bill.

Section 609. Carriage of broadcast signals

1. The City supports the Bill's provision authorizing the FCC to regulate the carriage of radio and broadcast signals. In particular, the City would urge that, pursuant to this provision, the FCC continue its mandatory signal carriage rules with respect to local over-the-air broadcast signals. The City believes that such rules foster diversity in programming services and ensure that the viewing of over-the-air signals is not hampered or interfered with as a result of operation of the cable system.

2. Because of the exclusive jurisdiction provisions of § 603, there may be some inconsistency between § 603 and § 607. Section 607 permits local jurisdictions to regulate rates for "basic service," which may consist solely of broadcast signals. (*See* § 604(1).) The Bill, or the legislative history, should make clear that local jurisdictions may regulate rates for basic service, which may include broadcast signals.

3. Broadcasters receive a benefit from having their signals carried over the cable system pursuant to the FCC's mandatory carriage rules. At present, the costs of carrying local over-the-air signals are borne by subscribers. The City suggests that it may be appropriate for broadcasters to pay their fair share of the costs of carriage of their signals. *All* broadcasters would be subject to a charge, which would be applied on a non-discriminatory basis. The City makes this suggestion so that the burden of the mandatory carriage rules does not fall solely on subscribers, thereby creating an indirect subsidy for commercial operations. The appropriate mechanism for establishing the charges to broadcasters would require futher study.

Section 610. Fairness doctrine, equal time, and reasonable access

The City does not object to the express exemption of cable operations from the fairness doctrine, equal time, and reasonable access requirements of the Communications Act. However, the City does not believe that there should be federal preemption of this area. Local jurisdictions should be able to formulate programming standards, consistent with the First Amendment, which are designed to promote the same set of public interest goals and concepts as the foregoing federal principles. While the City does not contemplate the adoption of such standards, it should be able to take actions to correct abuses concerning access to the cable system. Of course, the First Amendment will determine the boundaries of permissible governmental interference in programming.

Section 611. Franchise fees

1. The City opposes the provision directing the FCC to establish ceilings on franchise fees paid to local authorities. The streets of the City are a valuable resource, and the City should have a right to obtain a fair and reasonable price for their use. The federal government should not preclude cities from negotiating reasonable franchise fees from cable operators.

a. Section 611 might be interpreted to permit the FCC to adopt more than one fee ceiling. Thus, ceilings applicable to different cities might vary. This approach underscores the desirability of permitting local jurisdictions to establish the fees, since the FCC would become involved in evaluating local conditions on a city-by-city basis.

2. This Bill comes at a time when the FCC has publicly stated that it is considering repeal of its fee restrictions because there are "serious questions about . . . the desirability of a federal limitation on franchise fees. . . ." 71 F.C.C. 2d 569, 584 at ¶ 34 (1979). Notwithstancing the FCC's statement, the Bill seems to require the FCC to maintain a fee ceiling in perpetuity and to adjust the ceiling from time to time.

3. The FCC fee limitation was adopted when the cable industry was in its infancy. It is not longer necessary to protect the industry to ensure that it has the necessary development capital. Today, cable is a maturing industry without need for protective barriers imposed by the federal government.

4. The language of the franchise fee provision is unclear to some degree, because the provision refers to "fees," rather than just "franchise fees." The term "fees" might be interpreted to include other types of services that are made available to local jurisdictions as extra-service packages. The City urges that, if Congress does adopt § 611 or a similar franchise fee provision, the Bill, or the legislative history, make clear that local jurisdictions may continue to negotiate extra-service packages that will not be considered part of, or charged against, the franchise fee.

Section 612. Protection of subscriber privary

1. The City supports the protection of subscribers' right to privacy. However, the City does not believe that the federal government should have exclusive jurisdiction to establish rules and regulations governing subscriber privacy. The City believes that it is in the best interest of subscribers to permit local authorities to prescribe additional privacy requirements not inconsistent with any federal standard. For example, the City may wish to require its franchisees to develop a privacy protection plan setting forth the procedures to ensure the confidentiality of individually identifiable subscriber information. Section 612 should not preclude the City from doing this because of federal preemption.

2. The City suggests tht § 612 may be overly restrictive with respect to the ability of local jurisdictions to regulate their cable systems. A municipality may wish to conduct an audit of its system to determine whether the operator has been paying the proper amounts in franchise fees. It appears that § 612 would prohibit the municipally from obtaining the necessary documentation to conduct the audit. The Bill should make clear that local jurisdictions may obtain the information required to perform their regulatory functions.

Section 613. Technical standards

The City does not oppose the establishment of minimum technical standards by the FCC. However, the City believes that local authorities should be permitted to impose additional performance and testing requirements to ensure that cable operators distribute a high quality picture, free from noticeable interference. Existing FCC technical standards do not ensure that cable systems deliver signals of a quality consistent with the state-of-the-art. Local jurisdictions should have the right to determine that the quality of signals distributed over their systems should be higher than that dictated by a "national average" adopted by the FCC. In addition, if the FCC has not adopted a standard of a particular performance measurement, local jurisdictions should be able to act in that area.

1. Even under existing FCC rules, localities may impose different standards from those required by the FCC if:

The FCC has set no standard and there is a demonstrated state or local need for such a standard, or

The FCC standard is inadequate to meet local needs or conditions.

Under the exclusive jurisdiction provision of § 603(1) of the Bill, local authorities could not establish rules or policies with respect to technical standards, regardless of whether the FCC had acted to adopt a particular standard and whether there was a local need for such a standard.

Section 614. Records

The bill should make clear that local jurisdictions may also require the maintenance of such records and submission of such reports by cable operators as may be necessary or appropriate in connection with local regulatory responsibilities.

Section 615. Equal employment opportunity

The FCC should establish minimum standards in this area. Local jurisdictions should be able to develop such EEO policies as may be necessary or appropriate for local conditions.

Section 616. Sports

The City supports the principle that the rights of copyright owners, such as sports interests should be protected.

Signal piracy

The Bill provides specific remedies for violation of Section 605(a) of the Communications Act. Section 605(a) prohibits the unauthorized publication or use of interstate or foreign communications by wire or radio. The City supports the strengthening of the remedies available against theft of signals.

The City has also proposed that Congress consider legislative action in the following areas:

1. The City proposes that Congress adopt legislation that would exempt municipal franchising actions from the antitrust laws. This would permit all cities—whether or not their state legislatures had adopted a state cable statute authorizing their actions—to reach franchising decisions that make economic sense and are in the public interest.

2. The City proposes that Congress adopt legislation that would either set, or permit local jurisdictions to set, limits on the fees or other conditions which private property owners could demand from cable operators for the installation of cable facilities on their property.

Senator **Goldwater**. Mr. Ralph Lee Smith.

Mr. **Smith**. Yes. Thank you. Good morning, Senator Goldwater.

Senator **Goldwater**. Would you put one of the microphones in front of you?

Mr. **Smith**. Thank you very much. My name is Ralph Lee Smith. I am vice president for policy and planning studies of the Bertman Group, a telecommunications firm. Our company counsels private companies—I should add, including cable companies—nonprofit organizations, and governmental agencies in the fields of cable television and other communications technologies.

We wish to congratulate the committee for the many important initiatives in the cable field that are reflected in the bill. We are off to a good start. But the road ahead is a rocky one.

I may be the only witness this morning who is not even going to discuss television programing in the context of my statement. This morning I want to discuss nonentertainment uses of cable systems in our towns and cities. Such uses include voice, video, and data transmission by governmental agencies, schools, nonprofit institutions, and commercial and business firms.

This is one of the swiftest-growing frontiers of the communications revolution. We are much interested in it, and are helping cable companies, local governments, and local business firms to "get aboard."

I might add, Senator Goldwater, that this is a frontier in the communications revolution in which we enjoy technological leadership. It is expected to grow in its technological requirements at 57 percent a year for the next 5 years, and most of the equipment is American-made.

In modern cable systems, such uses are largely accommodated by one or more coaxial networks that are interconnected with, but are in addition to, the subscriber network. These institutional and commercial networks link up local government offices and agencies, educational facilities, health facilities, libraries, nonprofit groups, and business firms for voice, video, and data transmission.

None of the users of such networks is a cable subscriber.

The communications content of the networks is provided, not by cable operators, but by users, on the basis of unrestricted access.

The combined capacity of the institutional and commercial networks of a modern cable system amounts to one-third to one-half of the total channel capacity of a modern cable system.

Let us review the status of such usages and facilities under the bill.

According to section 604(8), the institutional and commercial networks either do not exist or are not part of a cable system—I cannot tell which.

Whatever their status, their channel capacity must presumably be added to the channel capacity of the subscriber network to arrive at the total capacity of the system for the purpose of calculating access requirements under section 606.

Are institutional channels "access channels'? They obviously are. How then do they relate to the requirements of section 606? How are the access requirements for the whole system affected or impacted?

Finally, numerous desirable and important applications of new technology are prohibited by the bill. For example, section 606 prohibits the following:

Lease of a subscriber system channel by a business firm to transmit computer-assisted training and instruction to employees in their homes;

Lease of a subscriber channel for any form of video conferencing;

Lease of a subscriber channel to link up word processors in employees' homes with centralized word processing facilities in company offices, thereby enabling some employees at home;

Lease of a subscriber channel by a public utility to read residential gas and water and electric meters.

Such anomalies will arise until we correctly formulate and address the real basic policy issues that are implicit in the new technologies. As a start, I recommend that two new purposes of the legislation be added to the two that are already set forth in section 602. The two new purposes would be as follows:

The first of them is:

> To assure maximum availability of cable communications facilities at reasonable rates for all public and private users for the conduct of business and public service, in accordance with the preamble of the Communications Act.

The second one is:

> To foster through appropriate Federal action the development of the full technological, commercial, and social capabilities of the medium for the benefit of the public and private sectors of our society.

At this point I would like to address in friendly dialog the comment of Gustave Hauser, with whom I have had a long-standing disagreement on what business he is in.

He said that he knew of no demonstrated need for these type of commercial applications. I am happy to provide him with numerous surveys we have done that show tremendous local need for extended areas of communications. And I would say to him, if I may, with a smile, that the only communications capability of cable for which I know of no demonstrated need is the delivery of 100 channels of television into the American home.

I have appended to my statement a page-long list of nonentertainment, nontelevision programing applications of communications technology in our society. Thank you very much.

Senator GOLDWATER. Thank you.

[The statement follows:]

STATEMENT OF RALPH LEE SMITH, VICE PRESIDENT FOR POLICY AND PLANNING STUDIES, THE BERTMAN GROUP, INC.

Good morning, Senator Goldwater, and Members of the Committee and Members of the Staff.

My name is Ralph Lee Smith. I am Vice President for Policy and Planning Studies of The Bertman Group Inc., a telecommunications consulting firm.

Our company counsels private companies, non-profit organizations, and governmental agencies in the fields of cable television and other communications technologies.

We wish to congratulate the Committee for the many important initiatives in the cable field that are reflected in the Bill. We are off to a good start. But the road ahead is a rocky one.

This morning, I want to discuss non-entertainment uses of cable systems in our towns and cities. Such uses include voice, video, and data transmission by governmental agencies, schools, non-profit institutions, and commercial and business firms. This is one of the swiftest-growing frontiers of the communications revolution. We are much interested in it, and are helping cable companies, local governments, and local business firms to "get aboard".

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Are institutional channels "access channels?" They obviously are. How, then, do they relate to the requirements of Section 606? How are the access requirements for the whole system affected or impacted?

Finally, numerous desirable and important applications of new communications technology are prohibited by the Bill. For example, Section 606 prohibits the following:

Lease of a subscriber system channel by a business firm to transmit computer-assisted training and instruction to employees in their homes;

Lease of a subscriber channel for any form of videoconferencing;

Lease of a subscriber channel to link up word processors in employees' homes, with centralized word processing facilities in company offices, thereby enabling some employees to work at home.

Lease of a subscriber channel by a public utility to read residential gas and water meters.

Such anomalies will arise until we correctly formulate and address the real basic policy issues that are implicit in the new technologies. As a start, I recommend that two new purposes of the legislation be added to the two purposes that are already set forth in Section 602. The two new purposes would be as follows:

"(3) to assure maximum availability of cable communications facilities, at reasonable rates, for all public and private users for the conduct of business and public service, in accordance with the Preamble of the Communications Act, and

"(2) to foster, through appropriate Federal action, the development of the full technological, commercial, and social capabilities of the medium for the benefit of the public and private sectors of our society."

From there on, we would have to do some heavy work on the text.

Thank you for your time, and thank you for getting us all launched on this important undertaking.

TYPICAL NON-ENTERTAINMENT USES OF CABLE SYSTEMS

High speed data transmission.
Facsimile printout.
Videoconferencing.
Computer-assisted instruction.
Computer-to-computer links.
Access to information stored in data banks.
Banking and shopping services.
Security and alarm services.
Energy management services.
Communications links for traffic light and traffic control devices.
Monitoring of water supplies.
Video transmission between and among public shcools in a school system.
Transmission of data between and among public and private health facilities.
"Video clinics" linking outlaying clinics and health facilities with central hospitals.
Various applications of videotex and teletext.
Broadband wiring of university campuses and industrial parks.
Interconnection of word processors.
Substitution of coaxial cable facilities for dedicated lines leased from the telephone company.
Trunking of PBX telephone service for large telephone users.
Provision of local links for satellite-transmitted voice, video and data transmission.

Senator **Goldwater**. We will now hear from Mr. Edward Burke.

Mr. **Burke**. Thank you, Mr. Chairman. My name is Edward F. Burke. And I am the president of the National Association of Regulatory Utility Commissioners, which includes all the State regulatory agencies in the United States, most of the Provinces of Canada, and we have memberships from most of the Federal agencies also.

I am also the chairman of the Rhode Island Public Utilities Commission. And then, finally, the Rhode Island General Assembly, in its wisdom decided that I should serve as administrator of the division of public utilities, and as the sole regulator of cable television in the State of Rhode Island. And we have statewide regulation.

Before I get to my remarks, I just must follow up on what I have just heard from Mr. Smith, because I am very proud to say that in the State of Rhode Island there is a condition of franchise where we have required each of the cable systems to include what we call an institutional-industrial network to carry out all of the functions that Mr. Smith has just described.

We find great interest in the State of Rhode Island. We found that business and industry are extremely interested in this, and we feel this is going to be one of the real waves of the future as far as the cable systems are concerned.

Now, in my role of president of NARUC, I would like to say briefly that we feel the role of the Federal Communications Commission in regulating telecommunications should be limited to issues of Federal concern, as was the case with the telecommunications media addressed in the 1934 Communications Act.

Other than that, we feel that primary responsibility for the regulation of cable should be left to State authorities with an intimate knowledge of local situations, because we think they are in a preeminent position to balance the competing interests that may be involved in cable communications decisions.

We fully subscribe to the thought of the New Federalism and State's rights in this regard. We feel that the proposed legislation should be revised to reflect the State's primary jurisdiction on all matters concerning franchise cable systems and to permit the States to establish additional regulations concerning technical standards and access channel provisions compatible with Federal regulations in these areas.

We feel the Federal regulations should be minimum regulations. And if the States feel appropriately that they should go beyond that, they should be allowed.

We feel that the provisions of the legislation that would require State and local governments to pay fair market value to acquire ownership interest in cable is an unnecessary duplication of constitutional protections. And I fully subscribe to the comments that Mr. Tarshis has made in that regard. We feel that the States—again, I agree with what Mr. Tarshis has said—should have regulatory authority over ownership and control of cable systems operating within their respective borders. Where warranted, State authorities should be able to prescribe conditions or limitations applicable to cable system owners or their agents to further protect the public interest.

Provisions of the bill that would authorize the FCC to establish franchising fee ceilings also, we feel, represent a substantial intrusion on the conduct of States' cable regulation schemes.

I say that despite the fact that in the State of Rhode Island we have a franchise fee of $50 a year and set no rates at all. Our only protection is that the rates should not be discriminatory.

Finally, if I can simply sum up and make a couple of random comments. We feel that the proper Federal role is determining national telecommunications policy. The proper State and local role is selection of franchises, negotiation of contracts, and oversight of companies.

I must say that personally I feel that I am not persuaded that we should lose the protections of the fairness doctrine. I can see some dangers developing, especially in remote areas where cable television is the only system of communications. We think that there should be a national policy affirming the principle of access to cable television, and we think that the implementation of this policy should be left to the States and localities where the ultimate conditions on franchise conditions and contracts are made.

I am also proud of what we have done in Rhode Island. I intended to bring with me a copy of our State regulations which, in many respects, Senator, parallel at a State level the provisions which you have in your proposal. And I would like to submit that for the record, the copy of our State regulations.[1]

We have librarians, businessmen, mayors in each of the service areas. They engage in a dialog relative to community needs with regulators. I believe that we should regulate only when necessary and not act as "Big Brother." I think it is working out very well. We are developing a statewide interconnect system.

One last word. I subscribe to the blackout provision, but I assume it means—I live 44 miles from Boston, so I can see the Red Sox blacking out their game. But I am always the kid on the block who always rooted for the Braves, and I have been waiting to see Phil Niekro and this is his year, and I do not want to be interrupted by any restrictions. Thank you very much.

[The statement follows:]

STATEMENT OF EDWARD F. BURKE, PRESIDENT, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Mr. Chairman and Members of the Committee: My name is Edward F. Burke. I am the President of the National Association of Regulatory Utility Commissioners [NARUC]. I am also Chairman of the Rhode Island Public Utilities Commission, and I have served in that capacity since January 1977. Accompanying me today are Paul A. Rodgers, NARUC Administrative Director and General Counsel; Rita A. Barmann, NARUC Director of Congressional Relations; and Donna S. Bolinger, NARUC Assistant Director of Congressional Relations.

The NARUC is a quasi-governmental, nonprofit organization founded in 1889. Within our membership are the officials who sit on governmental agencies within the fifty States and the District of Columbia, Puerto Rico and the Virgin Islands which have the authority to regulate utilities and carriers. Our chief objective is to serve the consumer interest by seeking to improve the quality and effectiveness of public regulation in America.

On behalf of the members of the NARUC, I would like to thank the Committee for this opportunity to discuss our observations and concerns regarding S. 2172, legislation proposing the Cable Telecommunications Act of 1982.

NEED FOR REGULATION

The members of the State regulatory commissions commend Sen. Goldwater and the bill's co-sponsors for taking steps to clarify the inconsistent and uncertain regulatory environment in which cable television has operated during the past twenty years. It is our strong belief that marketplace forces alone cannot effectively accomplish the central and overriding aims of cable, as well as those of other telecommunications systems: free and diverse expression that ensures the public the most complete information available, at rates which are just and reasonable, and in compliance with standards that assure safe and reliable service.

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[1] The material referred to has been retained in the committee files.

While marketplace forces may play a large role in determining programming content, we believe that their operation in absence of regulatory oversight is more likely to result in homogenity of ownerships, expression and information. Similarly, market forces should not be permitted to operate as the sole determinant of cable service rates and technical standards, for the same reasons that public utilities' rates and service have always been regulated: so that the consuming public is protected from unjustified rates or technically inferior service in obtaining what is often a monopoly-provided service.

The Federal Communication Commission's (FCC's) regulatory posture toward cable had turned nearly 360 degrees during ther past 20 years. Lacking Congressional guidance and uncertain of its authority under the Communications Act of 1934, which does not address cable telecommunications, the FCC first denied that it had jurisdiction over cable. Later, the FCC asserted full regulatory authority in a manner that effectively restricted cable development; most recently, it adopted a very limited role in cable regulation that was intended to encourage its development. This vacillation in regulatory authority has left the cable telecommunications medium in constant upheaval. Clearly, the need for Congressional regulatory clarification is long overdue.

FEDERAL AUTHORITY UNDER S. 2172

While we support Congressional action addressing the regulation of cable, the members of the State regulatory commissions are concerned by provisions of S. 2172 which would grant the FCC primary regulatory authority over many aspects of cable other than service rates, including matters that are clearly beyond its role of overseeing a national cable telecommunications policy. We do not attempt to dispute provisions of the 1934 Act that grant the FCC overriding responsibility and authority to regulate aspects of the telecommunications field which can only be effectively shaped on an interstate basis. However, the members of the NARUC believe that Federal authority over cable should be limited issues of Federal concern. Specifically, we would identify those areas in which Federal jurisdiction is appropriate with respect to cable operations as the establishment of minimum technical standards regarding transmission and the minimum provision of access channels.

Our position is supported by findings of a special subcommittee appointed in 1971 by President Nixon to develop proposals for a comprehensive national policy on cable communications.

In its 1974 report to the President, the Cabinet Committee on Cable Communications noted that "Federal authority need not and should not intrude into all aspects of cable operations . . . The only aspects of cable operations that appear to require continuing supervision by a Federal agency are enforcement of technical transmission or distribution standards and the sports anti-siphoning restrictions." [1]

NEED FOR PRIMARY JURISDICTION AT STATE LEVEL

It is our strong belief, however, that the public interest is best served when decisions impacting upon the quality of citizens' lives are made by officials who are easily accessible to these citizens. It is those officials, rather than those of the Federal government, who have an intimate knowledge of local situations and who are in a preeminent position to balance any competing interests that may be involved in such decisions.

Given this perspective, we believe that the primary responsibility for the regulation of cable is clearly best left to State and local authorities. We are pleased to note that as currently drafted, S. 2172 demonstrates some appreciation of our position regarding the efficacy of State and local regulation.

We view the proposed legislation as a positive step in comparison with amendments offered last year to S. 898, a bill proposing the Telecommunications Competition and Deregulation Act of 1981, which would have denied States the right to establish, restrict or fix rates for the sale or use of cable capacity or time on such channels or cable services. In contrast, the legislation currently under consideration would contribute to the development of an appropriately balanced cable television policy by authorizing States to establish rates for basic user service fees and for sale and use of channels.

Notwithstanding these improvements in the approach taken by S. 2172, the legislation fails to ensure an adequate State role in the regulation of cable telecommunications. In particular, the Naruc objects to the bill's prohibition on State regulation of cable system ownership and control (Section 605); its limitation of State jurisdiction to regulation over basic cable service rates (Section 607); and its grant of authority to the FCC to establish ceilings on cable franchise fees paid to States (Section 611). In the remainder of my testimony today, I will address these specific concerns and suggest appropriate revisions to S. 2172 in order to provide for a properly, yet effective Federal/State regulatory scheme.

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[1] The Cabinet Committee on Cable Communications, *Report to the President* (January 14, 1974), p, 2.

OWNERSHIP AND CONTROL OF CABLE SYSTEMS

Section 605 of S. 2172 would, with some limited exceptions, put issues of cable system ownership and control beyond the authority of either State or Federal regulatory bodies. Such an arrangement can only be justified if the following assumptions are accepted: (1) that cable services operate in a fully competitive environment; and (2) that such competition is sufficient to ensure efficient cable service at the most economical cost. The NARUC submits that neither assumption can be considered as well-founded.

Although cable systems are proliferating at a rapid rate in some highly populated sectors of our nation, the industry's development remains monolithic in many other areas. The substantial costs of duplicating an already existing distribution system are such that few if any potential operators can surmount this economic barrier. The reality is that competition for ownership of cable systems within a given locality is highly restricted due to the nature of the medium.

In light of these circumstances, it is imperative that States have authority to decide who among competing entrants to a cable market should be permitted to own or control the cable system to be established in the market. Likewise, States must retain authority over ownership and control after a cable system's operations have evolved to the extent that the public service provided can be scrutinized. States are in the best position to provide the protection needed by the consumer of cable television service. Where it is warranted, State authorities should be able to prescribe conditions or limitations applicable to cable system owners or their agents in furtherance of its role in protecting the public.

We therefore urge that Section 605(a) be amended to eliminate its prohibition on State exercise of regulatory authority over cable system ownership or control.[2]

The NARUC also objects to inclusion of the provision in Section 605 which requires State and local governments to pay no less than full market value for acquiring an ownership interest in a cable system. This provision, set forth in Section 605(c), is a completely unnecessary duplication of protections provided by the U.S. Constitution, which forbids the taking of property without just compensation. Its inclusion in S. 2172 tends to cast unwarranted aspersions on the willingness of States and localities to abide by this constitutional precept. Accordingly, we suggest that it be eliminated from the legislation.[3]

LIMITATIONS ON STATE JURISDICTION

S. 2172 provides for State regulation of basic cable service rates on a nondiscriminatory basis. While we applaud this effort to preserve States' authority in an area which they are indeed best equipped to oversee, the NARUC believes that State authority must not be restricted to cable rate regulation. Specifically, we urge that S. 2172 be revised to reflect the preeminence of States in all matters concerning franchised cable systems and to permit the States to establish additional regulations concerning technical standards and access channel provision which are not incompatible with Federal regulation of these areas referred to in other provisions of the bill.

The reasons for preserving such a broad role for State regulation of cable television are grounded, once again, in a recognition of the need for scrutiny which best reflects understanding of local community needs and circumstances. Knowledge concerning the legal, technical, financial and character qualifications of cable franchise applicants is uniquely within the province of State authorities. Similarly, States are best able to determine whether the granting of a franchise is in the public interest and whether any limitations on the franchise's conduct or duration are necessary.

With respect to service standards and public access channels, local variations dictate that regulation be sufficiently flexible so as to take into account all relevant factors. While the establishment of national minimums in each of these areas is an acceptable part of developing a nation-wide cable telecommunications policy, States should not be preempted from establishing additional requirements which may be more than that required at the Federal level. It is decidedly in the public interest to leave as much of such regulatory authority concerning local matters as possible with the States, since this keeps government close to the governed and thereby encourages prompt and responsive consumer protection.

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[2] This amendment may be made by striking out in lines 11 through 13 of Section 604(a), p. 8, the language immediately after "Commission," up to and including "franchising authority,".

[3] This amendment may be made by striking out Section 605(c) (p. 9, lines 24 and 25, and p. 10, lines 1-10) in its entirety.

We respectfully request, therefore, that Section 607 of S. 2172 be amended so as to assure State authority concerning the above-described matters.[4]

FRANCHISING FEE CEILINGS

In keeping with the positions I have just outlined regarding retention of broad State authority over cable system operations, the NARUC also requests that Section 611 of S. 2172 be deleted from the bill. This provision would permit a substantial intrusion by the FCC in the conduct of States' cable regulation schemes. Franchise fees are comparable to similar taxes imposed on other regulated entities in order to reflect the value of using public rights-of-way in operating their businesses as well as the cost of regulating and otherwise overseeing the entity. Federal prescriptions regarding these fees are no more permissible than is any other usurpation of the States' taxing power.

Moreover, it is a well-known principle that consumers of a particular product, such as cable television service, are, in the final analysis, the group upon which any higher costs fall. Franchise fees ultimately will be passed onto cable system subscribers, and the NARUC submits that this cost-passthrough effect will operate as a self-correcting restraint on the implementation of fees at unreasonably high levels. Any State that desires viable cable service within its borders will be forced to reckon with this reality.

Consequently, we support revision of S. 2172 so as to eliminate the bill's delegation to the FCC of authority over franchise fee ceilings.[5]

CONCLUSION

Cable telecommunications operations provide a public service tailored to the needs of the communities they serve. State authorities are in the best position to provide whatever government regulation is necessary to protect consumers of these services from exorbitant rates and inferior service. Responsibility for regulating cable operations should therefore be reserved to the States with the exception of those interstate aspects of cable communications which are beyond effective State regulation. This division of regulatory responsibility between the States and the Federal government can best assure the adequate and just distribution of cable service which the public interest requires. The NARUC urges that its suggested amendments be incorporated within the provisions of S. 2172 so that such an appropriate division of authority can be best accomplished.

Thank you for your attention.

[The following information was subsequently received for the record:]

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[4] This amendment may be made by striking out in the heading on p. 12, line 16 the word "RATE" and inserting in lieu thereof the word "STATE", and by revising Section 607 to read as follows:

"SEC. 607. Nothing in this Act shall be construed as limiting the authority of Each State or political subdivision or agency thereof, or cable franchising authority, to:

"(a) establish, fix or otherwise restrict the rates, on a nondiscriminatory basis, charged for the use or sale of cable service or channels;

"(b) regulate all aspects of franchise cable systems, including but not limited to payment of franchise fees, the prescription of franchise operating territory, the duration of franchises, and any restrictions or conditions with respect to the conduct of such cable systems;

"(c) establish technical service standards or regulations respecting the provision of access channels which are not incompatible with such standards or regulations established by the Commission under sections 606 and 613 of this Act; or

"(d) establish any other regulations deemed appropriate for the effective regulation of cable telecommunications systems and which are not incompatible with any other provision of this Act.".

[5] This amendment may be made by striking out Section 611 (p. 14, lines 8–19) in its entirety.

SUPPLEMENTAL STATEMENT OF EDWARD F. BURKE, CHAIRMAN AND ADMINISTRATOR, RHODE ISLAND PUBLIC UTILITIES COMMISSION, RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS

To the Chairman and Members of the Committee: Edward F. Burke, Chairman of the Rhode Island Public Utilities Commission and Administrator of the Rhode Island Division of Public Utilities and Carriers, hereby submits supplemental comments on S. 2172 and S. 2445, legislation proposing (respectively) the Cable Telecommunications Act of 1982, and the Cable Telecommunications Competition and Deregulation Act of 1982.

In my latter capacity as Administrator of the Division of Public Utilities, I am the person charged by the Rhode Island General Assembly with sole franchising and regulatory authority over cable televison in the State of Rhode Island. The comments below are offered on behalf of the Commission and Division, and not in my capacity as President of the National Association of Regulatory Utility Commissioners.

I wish to thank the Committee for this opportunity to expand upon the comments and extensions of remarks which I made in oral testimony before the Subcommittee on Communications on April 27, 1982. These comments express my personal views on an issue underlying any discussion of the cable television legislation presently before this panel: the legislative definition of a "telecommunications carrier."

THE PROPOSED DEFINITIONS

Both Section 604(15) of S. 2172 and Section 603(17) of S. 2445 define a "telecommunications carrier" in a negative way, and in nearly identical language. In essence, a "telecommunications carrier" or "carrier" is defined as a provider of telecommunications service and/or facilities (S. 2445 chooses to define the phrase solely in terms of facilities), but neither a broadcaster nor a provider of cable telecommunications services, to the extent that they are so engaged, is to be considered a telecommunications carrier.

A positive statement of this definition could be that "telecommunications carrier" means "a person subject to common carrier regulation under other titles of this act." In other words, a telephone or telegraph company, or a radio service regulated on a common carrier basis (i.e., satellite communications, certain terrestrial microwave services, and multipoint distribution service), are to be considered telecommunications carriers. Cable however, is not.

My basic thesis is that a legislative definition of a telecommunications carrier which excludes cable telecommunications is premature, may result in a statutory and regulatory anomaly, and will certainly result in a confusing situation for those States which have exercised legislative and regulatory authority over the cable telecommunications industry. For these reasons, set out in detail below, I recommend amendment of the definition of "telecommunications carrier" to eliminate the cable telecommunications exemption.

THE CHANGING NATURE OF THE INDUSTRY

The fact that the cable telecommunications industry has changed and evolved over the last thirty or more years is documented by the changes in the names given to the industry during that time. At first, it was known as "community antenna television." Later, the term "cable television" was used. "Cable telecommunications" and "broadband telecommunications" are the current terminology.

The nature of the industry has changed from a provider of broadcast retransmission only, to a provider of a wide range of entertainment services, to the present and future role as provider of a full range of telecommunications services, including data transmission, teletext and videotext services, and a wide variety of interactive communications applications. (The testimony of Mr. Ralph Lee Smith of the Bertman Group, Inc., before the Subcommittee on April 27, 1982, includes a comprehensive listing of such non-entertainment services which can be provided by cable systems).

The cable industry is undergoing evolutionary change. It shows signs of evolving into a common-carrier-type service provider. Moreover, while cable telecommunications is not now considered to be an "essential" service—which the industry correctly points out is a recognized characteristic of a wire-distributed common carrier, though the distinction does not hold for radio services regulated as common carriers—there is no way to be certain that cable will not become an essential service in the future. This could be a real possibility if existing communications technologies, most notably telephone, cable television, fiber optics, and computer technologies, continue to converge and result in a "wired nation" with one wire providing all these services, and more.

I do not mean to suggest that the cable telecommunications industry, or parts of it, should necessarily be regulated as a common carrier. Rather, I am suggesting that we who are charged with overseeing the development of telecommunications policy at the national and state levels may soon discover that cable has become a carrier, and so should be treated as a carrier.

A Congressional definition—especially a preemptive one—of cable telecommunications which specifically prohibits regulatory authorities from regulating cable as a telecommunications carrier would pre-judge the nature, extent, and direction of the industry's future growth. It could also lead to the anomaly of a carrier-type industry or service which is not, and cannot by law be, subject to the same statutory and regulatory controls as other industries and services now recognized as telecommunications carriers.

For these reasons, I submit that defining cable communications in such a way that it cannot be considered a telecommunications carrier in the future is premature.

STATUTORY CONFUSION FOR THE STATES

In some states, including those where cable telecommunications are under the jurisdiction of the public utility regulatory authority, the adoption of a pre-emptive Congressional definition of a "telecommunications carrier" which excludes cable telecommunications from future consideration as a carrier could present serious problems for the regulatory agencies and for the legislatures. Such a pre-emptive definition could effectively nullify the rationale and statutory basis for the existing regulatory framework.

Rhode Island is especially vulnerable in this regard. Title 39, Chapter 19, Section 39-1-2, of the Rhode Island General Laws declares an owner or operator of a community antenna television system, "to be a communications carrier and as such subject to the jurisdiction of and to such reasonable rules and regulations as the division may prescribe . . ." (emphasis added). Neither the General Assembly nor the drafter of the legislation, my predecessor Administrator Archie Smith, defined the term "communications carrier," although it appears that they meant to distinguish it from a "common carrier of communications," i.e., a telephone or telegraph company.

Research by the Division's staff has discovered that the term "communications carrier" is not used by an other jurisdiction. It is apparently unique to Rhode Island. Attempts to elicit an interpretation of this phrase from representatives of the cable television industry which will clarify the distinction between "communications carrier" and "common carrier" have not been successful.

Therefore, I am forced to conclude that there is no commonly accepted definition of the term "communication carrier," as used in R.I.G.L. Section 39-19-2. What *is* clear from the statute, however, is that a cable system is considered to be a communications carrier.

Now, the Congress proposes a definition of a "*tele*communications carrier," a close synonym of the Rhode Island term, which specifically *excludes* a cable system. If one accepts at face value the statements in S. 2172 (Section 603) and in S. 2445 (Section 604(b)) that the States may not regulate cable telecommunications in any way inconsistent with the "exclusive grants of authority under this title" (S. 2172) or "with the provisions of this title" (S. 2172) and of "the purposes and policies contained in this Act" (S. 2445), then logically Rhode Island's contradictory definition of a basic term defined in the Federal law must fall. And if that definition falls, the entire basis of Rhode Island's regulation of the cable industry is null and void.

I submit this situation would result in regulatory and statutory chaos in the State of Rhode Island and severely hamper the Division's ability to effectively monitor the growth of this fledgling industry in the state. I submit that for this reason, and for the parallel difficulties which could arise in other states, the definition of a telecommunications carrier in the proposed legislation should be amended.

TELECOMMUNICATIONS FACILITIES

Section 609 of S. 2445 poses a special problem which deserves mention before concluding.

This section seems to say that a cable system operator may offer its facilities for use by others, but may not be obligated to do so except by the Federal Communications Commission, and then only if there are no suitable alternative delivery systems in that particular market for the particular service proposed. (I suspect this is highly unlikely.)

Furthermore, the language of this section says that if a cable operator chooses to offer its telecommunications facilities for hire to others, then state authorities which have by law overseen and regulated similar services offered by other facilities provided in the past (and present) will have no say over such service offerings by cable companies.

I submit that such a situation leaves wide open the possibility that a cable system operator will be free to develop and offer common-carrier-type lines of business, without being subject to common-carrier-type regulation. This ought not to be the case.

CONCLUSION

I wish to make perfectly clear that I am not necessarily advocating that cable telecommunications be regulated as a common carrier. I believe it is premature to make that conclusion, although the industry seems to be moving in that direction.

Rather, the position I am advocating in these comments is one of keeping both Federal and State options open for the future, in order to respond to the growth and evolution of the industry over time.

I am also raising an issue of States' rights, and the proper division of Federal and State authority over the cable telecommunications industry. This broad issue has been addressed in the Statement prepared by NARUC for the hearing on S. 2172.

In summary, I submit that closing the common carrier or telecommunications carrier option for future regulation of the cable telecommunications industry is unwise and premature at this point. The definitions of "telecommunications carrier" proposed in S. 2172 and S. 2445 would pre-judge the future development of the cable industry and could result in a regulatory structure which would not be flexible enough to respond to the changing nature of the industry. Such definitions could also lead to statutory confusion in the States, nullifying long-standing State laws, regulations, and policies.

For these reasons, I urge the committee to amend the bills before it in the following manner:

In S. 2172, Section 604(15), delete the phrase, ". . . or in providing any cable service . . .".

In S. 2445, Section 603(17), delete the phrase, ". . . or in providing cable telecommunications . . .".

Senator **Goldwater**. Mr. Baruch, do you believe that it would be appropriate to require municipal licenses for other providers of communications services in order to parallel the franchising requirements imposed on cable systems?

Mr. **Baruch**. I believe that all competing media should be in the same regulatory position. If cable television is regulated locally by the municipality or the State, and these competing media are not—I believe they should be—I feel a little bit this morning like the settler being surrounded by the Indians in a circle around them, or David against Goliath, because I have formidable opposition here to the comments I have just made—4 to 1. And if I may, I would just like to answer some of the comments that have been made by some of the other copanelists, if I may, for a few moments.

Senator **Goldwater**. Surely.

Mr. **Baruch**. Mr. Geller mentioned access should be made available on a first-come-first-served basis. I firmly and truly believe that is not the way to get the most for the consumer in terms of progressive development in cable television. I think if you take the first come, first served, they will fill up the channels and there could be other desirable services which come down the line which would have no opportunity to get on.

As far as Times Mirror throwing off some other services, including Showtime, which we happen to own 50 percent of, that is not quite accurate.

But let me give you the other side of the coin. We provide Showtime to all of our cable systems, and yet we also take on Home Box Office and other services, because that is just plain good business. If we have the channel capacity, you are going to put other services on.

Mr. Tarshis mentioned the Federal-State-municipal advisory boards which Chairman Burch created some time ago, and in which the cable industry participated very actively. The regulations of the sixties and the seventies do no longer apply.

And when Mr. Tarshis says the 5 percent franchise fee has remained the same through the sixties and the seventies with the growth of cable television, what may have been a 5-percent fee on 10,000 subscribers to begin with, today is a 5-percent franchise fee on several times, if not dozens of times or 20 times, that many.

I believe the cost of regulation should be reflected in the franchise fee. I am told that in some areas of New York the city directly or indirectly is trying to get up to 12 percent of the revenue of the cable system.

As far as Mr. Smith is concerned—the nonentertainment services—first the FCC tells us how many channels we have to carry. Then others come along and tell us what we should do with the remainder of the channels. Yet it is our investment, our money that is being employed.

Finally, Mr. Burke, who is very much in favor of State regulation. Just two points: Other media—to come to your point, Senator—other media competing with us are not regulated by the State. Broadcasters are not regulated by the State, either television or radio. Why should we be? They compete with us.

New York State, for example, the only one I am familiar with, tried to stop us from putting in innovative sports services some time ago, which resulted in the *Brookhaven* legal case, which we won.

One more point: New York State, in terms of number of staff and costs for regulating one State's cable systems, approaches the size, budgetwise and in number of people employed, of the Federal Communications Commission, which must regulate the entire country's cable systems.

Thank you very much.

Senator GOLDWATER. Would any of you other gentlemen like to repond to those comments?

Mr. TARSHIS. I would like to comment, if I may, Mr. Chairman. I appreciate how Ralph feels, sitting here with the four of us. I hope you appreciate now how we feel when we meet with all of you, how overwhelmed we are.

Mr. BARUCH. No.

Mr. TARSHIS. It is nice to be sitting on the other side.

Sure, we would like to see 12-percent franchise fees, 15-percent franchise fees. But we are realistic in recognizing this is a business that is going to grow, and we know we have to develop a format where we are negotiating at arm's length. And if the 15 percent is something someone does not wish to pay, fine. We do have competition now for franchises.

Is it in the public interest for myself, an employee of the people of the city of New York, to say to them we cannot get more revenue despite the fact that we are offered it by one of the applicants in competition with his fellow applicant? What is immoral about raising dollar bills to help pay for Government and for the services that Government is obligated to perform?

The Federal Government is looking to the cities and has told the cities, in a sense, seek funds elsewhere, you are going to get less dollars from the Federal Government. And when we have an opportunity, when it is offered to us, how dare we, how could I possibly and not violate my oath of office, say to the people of New York, we will not accept any more, we will not help you meet your costs for fire, police, sanitation, education, because we have to save this poor defenseless industry?

They are not defenseless anymore. Mr. Baruch is right when he talks about the fifties and sixties being the fledgling years. I feel like being a pioneer with Mr. Baruch in this industry. They have grown. When you look at the giants who own the cable systems today, I do not think that they need your protection; they are big boys and they are capable of handling themselves. And I assure you that that is so.

As to the 5 percent, if the additional revenues the companies have derived over the years should have satisified us in the 5-percent revenue we get, then the 5-percent additional revenue should satisfy the cable companies. It did not. They sought increases. The rates for franchise fees for 1955, when we authorized the companies to commence construction, was $5 a month. It is now $11 a month, $11.75; to be exact. They needed the increases.

We recognized that. We responded to it. We have never denied them a reasonable increase in their subscriber rate, but it is immoral, improper, and indecent for the people of the city of New York whose streets they are using to be compensated.

This is not simply a privilege which we give them. They use the streets. The streets are valuable. The people are obligated to maintain them. We have to pay if anybody gets hurt on those streets. And we are certainly entitled to a reasonable value.

And as Chairman Fowler said to you yesterday, and as Mr. Kearse testified before you yesterday, the streets of the various cities vary in the quality and in the amount that we should be receiving for their use. They are not uniform.

The fee structure, incidentally, that you speak of in connection with your proposed legislation gives the FCC or would give the FCC, rather, the right to set a fee.

It does not indicate whether the fee ceilings would be a uniform one or whether they would have the latitude to recognize the different values of the different streets and different communities and set ceilings for those communities.

I hope it is not an oversight. If you would go that way, that you would at least give the FCC some latitude in determining the value of the different streets in setting the ceilings.

Thank you.

Mr. **Geller**. Could I respond?

Senator **Goldwater**. Yes, Mr. Geller.

Mr. **Geller**. I will be very brief. I just wanted to respond to Ralph's point about what is best for the consumer. If I urge you to allow one entity in Washington, D.C., to own all the TV stations on the grounds that he would program better for the consumer, counterprogram, or own all three networks on the ground that there would be counterprograming that would be better for the consumer, you would not do it in a million years because you would not want such concentration. You would want diversity of sources of information.

What we are talking about here is the same thing. We are not talking about 12-channel systems. We are talking about the new 400-megahertz system, 52 channels, 100 channels, 200 in Denver. What Ralph is saying is he wants to control the content. When people come into the cable industry there is no leasing. What the cable industry wants to do is to joint venture. You have a partner. I think, again, that goes against the Associated Press principle.

Finally, I would think he gets benefits from your bill. Your bill would say it has to be set aside, but then there is no entry barrier by the State as to any service. Mr. Hauser said he had to look around in order to find a place where he could Qube. He would have no State rate of return regulation. I think that that is a market plus.

Thank you.

Senator GOLDWATER. Mr. Burke.

Mr. BURKE. Yes, just very briefly. I find no good reason why the limit on franchise fees should be set by the Federal Government. We are dealing with franchises that are in the individual States and the communities. I would respectfully suggest that if the limitations are to be set on franchise fees, they ought to be set by the legislatures and the individual States who might decide that there should be no limitation on access to the communities.

If so, clearly if the fees are excessive and if we are operating in a free society, then cable systems are free not to seek entry into those areas. I think pretty soon the subject will take care of itself.

Senator GOLDWATER. Mr. Smith.

Mr. SMITH. Yes; thank you. We are here thinking this morning about revising the Communications Act of 1934, which I think is a pretty grave undertaking. I want to try to say what I think is the crux of our problem. I also want to use what I think are some slightly forbidden words.

I think the crux of our problem is that there has grown up in our towns and cities a communications technology whose entrepreneurs created it for the purpose of disseminating television. None of us, I think, foresaw the reality of what was being done. The reality of what was being done was that a broadbrand communications facility was being laid in our cities and metropolitan areas.

That now interfaces with an explosion of communications technology. The explosion of communications technology is entirely tied to the communications revolution, which involves many applications of a broadband communications system in metropolitan environments.

I have the following thoughts with regard to that. No. 1, the total capacity of the system that our company just helped design for a cable bidder in Montgomery County, Md., is 192 channels. The owner of that is going to control, to a greater or lesser extent, 192 channels of transmission capability in Montgomery County.

My feeling, looking at this from the long-range view of revising the Communications Act, is, No. 1, to understand this industry's destiny. Whether the present owners of it like that destiny, I think the technological logic is compelling. I think the destiny is it will serve many needs and many purposes.

The second thing, I think, and here we come to the forbidden word, is the destiny of any medium which is the only one of its kind, is carriage. It is going to have to carry, that is all there is to it.

What I say to the industry is two things. No. 1, face it. Face it. And No. 2, don't cry. When we analyzed in our company the profits that could be made on running these kinds of communication services in Montgomery County, I felt like telling them all, "Why don't you listen to me about how you can get rich?"

There are tremendous needs out there that this technology can fulfill, and I think we have to think about it as a total technology when it comes to revising the Communications Act of 1934.

Senator GOLDWATER. Mr. Baruch, having heard all the arguments——

Mr. BARUCH. I disagree with all of them, obviously.

I would like to tackle last Mr. Smith and his rosy view of the future and the marvelous situation we are all going to find ourself in, but I would also like to remind the committee and its chairman that in 1972 Mr. Smith was equally optimistic about some of the services that could be provided.

If I might read you some sentences from something he wrote:

> Cable can bring into your homes and into business places audio, video, and facsimile transmissions that can provide newspapers, mail service, banking, and shopping facilities, data from libraries and other storage centers and so on.

This has not happened yet. It is 10 years later, and it has not happened.

The cable television industry has never denied access on a reasonable basis to anyone with whom we can do business. Our interest, I will say again, is to provide maximum services which can give us the most subscribers.

As far as the regulation itself is concerned, I firmly and truly believe that the cities should not tax us for more than it costs them to regulate us. I say this with all the conviction I can muster.

Now, as far as using the city streets is concerned, I can think of dozens and dozens of businesses that use city streets and do not get the franchise requirements that have been put on the cable television industry. Let me cite one we have in common, publishing. A newspaper publisher delivers via the streets of the city. They do not pay franchise fees, they are not licensed, they are not required to give the number of pages in their newspapers or in the magazines to various interests and various groups.

I truly believe that cable is nothing but a form of video publishing. For it to have these limits upon it would retard its further growth.

Senator GOLDWATER. Does that prompt any ideas? You have just gone through every question I had to ask.

I do have one question of Mr. Geller that I think is rather important. The key section in this bill probably is the provision dividing regulatory authority between the Federal Government and the States. Would you tell us whether you believe the division in S. 2172 is appropriate?

Mr. **Geller**. I do believe that the approach you have taken here is an appropriate one in laying down guidelines and preempting the States from regulating the leased channel, its content or the rates for it; that you have correctly laid down guidelines as to privacy, and as to sports, and I agree with Morris that it is appropriate to lay down the guideline as to whether there should be foreign ownership—the reciprocity issue.

I would suggest on that that you look at it again. It takes a great deal of capital to wire America. If the Canadians want to supply that capital and were restricted to supplying it themselves, there might be a benefit to us. We might be hurting ourselves by cutting off the Canadian contribution. But that issue is appropriate for Federal consideration.

Finally, it is appropriate for the Federal Government to lay down the guidelines as to local regulation—the city of Boulder matter. You have specified that franchise fees shall be regulated by the FCC and limited to what is the cost of regulation, the FCC's 3- to 5-percent restriction. I think along with that you ought to free the local entity to do what it has to do as a police policy matter to regulate. That is appropriate for Federal legislation and I would suggest that you consider that.

Senator **Goldwater**. Before I excuse you, do you have any suggestions on that?

Mr. **Tarshis**. In connection with Federal preemption in the area of regulation of leased channels and the others, I know the FCC has preempted. I am a bit disturbed on behalf of the citizens of my community that preemption was not followed by some oversight, preemption, and then leaving it entirely to the cable operator to decide what to do just troubles me.

I am not saying that the industry has taken advantage of it. They have not, to my knowledge. But it is something that perhaps if there is preemption, there ought to be a legitimate undertaking to review and to look at it.

Let me just illustrate what I have in mind. There has been preemption and we recognize the FCC's preemption in the pay TV area or the enhanced services area. We in negotiating our present contract are seeking provisions that would assure that whatever rates are charged for leased channels be given on a nondiscriminatory basis to a similar class of users. The industry generally has been doing that in the past and there has been no problem in our negotiation to reach that aim, but this is an area in which we must be concerned.

The second is the fact that the cable operators, in an effort to prime the pump, so to speak, to induce people to come forward and show them the value of leasing their channels are doing programing. If another person or firm comes forward seeking to lease a channel to offer comparable services, I think we have an obligation to make sure that the rates that are set will not preclude somebody else from coming forward and leasing the channel; in essence, that the rates are not set so as to restrain trade, so as to avoid the competition we are all trying to achieve by this abundance of channel capacity.

So there are areas within that that attention has to be given to.

Mr. **Burke**. Senator, we at NAHRU are very gun shy about Federal preemption following Federal inaction. The Federal Railway Administration preempts on railway safety, and then has insufficient inspectors to maintain the safety of our railroads. The same is true as far as transportation of hazardous materials is concerned. So that I subscribe basically to what Mr. Tarshis has said on that subject. I feel that guidelines are the appropriate role of the Federal Government and not to preempt in areas where they do not intend to do things.

There are some very difficult issues in cable television and television in general, including obscenity. I do not know what the answer is to this, but I know that there has been Federal preemption by the FCC and precious little done on a very complex subject.

I would also like to say in closing that I would ask that you give careful attention to section 604(15) relative to the telecommunications area where you would clearly define cable television as not a carrier. I feel that as changes in technology come along as have been described by Mr. Smith, we may very soon discover that it is a carrier and ought to be treated as a common carrier.

Senator **Goldwater**. Mr. Baruch, yes.

Mr. **Baruch**. We have now been compared to railways that crash and many other forms of very dangerous procedures.

Mr. **Burke**. Not at all. That is not what I meant. I talked about Federal preemption and inaction.

Mr. **Baruch**. And the measures that must be taken to protect the citizen. I think the question is not whether there ought to be regulation but where the regulation should rest, if any at all. My point is to examine whether that regulation is needed, not who is going to regulate us. Is the regulation needed? Is there an abuse, is there something that is in the interest of the consumer? Then I believe regulation should in fact be put in place, but only at the cost of such regulation.

The city of New York at one point tried to regulate MDS services, which are over-the-air services. They failed in this. That is just one of the examples of overreach in regulation. Mr. Tarshis has done a fine job in the city with what they have got, but it took them years to try to get another service in the other boroughs. One or more may not be franchised not because the cable systems do not want to build it, but maybe the franchise is onerous to the point where the cable company says I do not want that kind of a franchise.

Senator **Goldwater**. Well, I think you can all feel—I don't know if "safe" is the word, but we are not looking for an excuse to have more regulation. I am personally looking for an excuse to do away with regulation.

Mr. **Baruch**. Thank you.

Senator **Goldwater**. That is the whole purpose of these hearings, to figure out just where we fit in the picture or whether you would be better off without Uncle Sam riding on your backs.

I want to thank you gentlemen. This has been a very interesting session.

Our next panel will be Mr. Allen Gilliland, chairman of the National Cable Television Association; The Honorable Tony Jordan, Jr., council member, city of Raleigh, N.C.; Mr. Jack Blanchard, president of the Mogollon Cable Television—and if you are looking at the schedule, it is spelled M-o-g-o-l-l-o-n, but we pronounce it "Mogeone"; Mr. Max Kiburz, Loup River Public Power District; and Mr. Kenneth "Brannies"—is that correct?

Mr. **Brannies**. Yes.

Senator **Goldwater**. Mr. Brannies, Guadalupe Valley Telephone Co.

Mr. Gilliland, you may proceed.

STATEMENTS OF ALLEN T. GILLILAND, CHAIRMAN, NATIONAL CABLE TELEVISION ASSOCIATION, GILL CABLE INC.; HON. S. TONY JORDAN, JR., COUNCIL MEMBER, CITY OF RALEIGH, N.C.; JACK BLANCHARD, PRESIDENT, MOGOLLON CABLE TELEVISION; MAX KIBURZ, LOUP RIVER PUBLIC POWER DISTRICT; AND KENNETH BRANNIES, GUADALUPE VALLEY TELEPHONE COOPERATIVE

Mr. **Gilliland**. Thank you, Mr. Chairman and members of the subcommittee. My name is Allen Gilliland. I am president of Gill Cable, San Jose, Calif. We operate a 92,000-subscriber system in San Jose. This past year I have had the privilege of being the chairman of the National Cable Television Association.

I am particularly happy to see that you have introduced a bill which finally addresses cable television and the communications media, and I congratulate you on that.

Sitting back in the audience as a cable operator, especially with this last panel up here, it makes you feel like you are getting divided up, your arms going here and your legs going there. I think one of the things that has been overlooked, Mr. Chairman, is that people like myself and other people in this room, Mr. Blow from Arizona, are people who really created the cable television industry and all of the fine things we do today, and granted all the technological capabilities that we have in the future were built out of mud, if you will.

We developed and built this great industry not with help from anyone. We didn't get it from the broadcasters, we didn't get it from the FCC, we didn't get it from anybody. We did it out of sheer entrepreneurship, out of risk and a desire to serve our subscribers, and we have done that. We have made great progress, and I think the thing that is being overlooked is all of a sudden everybody is saying, oh, gee, you guys have done such a great job, you have all these capabilities, now we want to divide you up into pieces and regulate you.

My point is if we have done such a good job and if we have created such an industry, why don't you leave us alone and let us continue on doing what we have been doing, and we will continue to do more, but leave us alone. Give us the ability, if you will, now to compete with other competitors who have now come on the scene. I think you have had plenty of discussion over that fact in the last 2 days, so we really do have competitive forces with STV, with MDS, with satellite-fed systems in apartment houses, all of these kind of things.

These people are not subject to any kind of Federal or State regulation. I think it is very unfair for cities and States to now want to take 5 percent of our gross revenue, impose all kinds of regulations on us, take away channels from us and not do that to our competitors. I think that is very unfair. I think that is something your bill should address.

I am not going to belabor that point because it has been discussed. The competitive situation has been discussed yesterday and today and I am not going to spend too much time on it.

There is another problem which I would like to discuss with you. It involves excessive Federal regulation, which is also not required of our competitors. Section 609 of this bill authorizes the FCC to set mandatory signal carriage rules.

Now, I recommend this section be deleted from the bill for two reasons. First, the dispute over must-carry rules has been resolved as the result of a comprehensive compromise reached by the NCTA and the National Association of Broadcasters, which is included in H.R. 5949, the cable copyright bill. It has already cleared the House Judiciary Committee, it will be considered by the Commerce Committee, and I would ask that you hold off any action on the must-carry rule until H.R. 5949 clears the House and it is in this committee.

We would vigorously oppose any regulation to give the must-carry statutory basis absent the sort of comprehensive agreement reached in the copyright bill. I think that is important. The reason that we agreed and came up with certain modifications in the must-carry rules is because it was a comprehensive agreement; it was not in a vacuum.

Second and more importantly, the reaffirmation of the must-carry rules by this committee would run counter to the deregulation efforts you have been pursuing. Must-carry is but another example of an unnecessary regulation. This time it happens to be at the Federal level rather than the local, which is borne by cable television but not by our competitors.

While such rules may have had some logic in the days when cable was principally a broadcast retransmission service ancillary to broadcast, if you will, there is no longer any justification for must-carry. Must-carry rules require that a cable operator provide channels first—remember, first—to every broadcast signal that can be theoretically viewed in his service area before any channels can be made available for a wide range of made-for-cable programing or even for public and community access. I want to point that out.

As some other people have testified to you, the number of channels which we control we do not control because a lot of them or a major portion of them in smaller capacity systems have already been given away through must-carry rules. The must-carry rules serve the broadcaster very well but it limits the number of alternative cable channels that can be programed and viewed by subscribers.

It is not unusual to have systems that have 10 to 15 must-carry channels. In the system I operate in San Jose, we have 16 must-carry signals. I have a chart here that shows you the number of signals that are must-carries in our signal. There are 16 of them that are taken right off the top of the channel capacity before anything else is available.

I believe that in the case of C-Span where it is not universal in all systems, as part of it is the must-carry problem, that there just is not any channel capacity to carry the signal if they want it because there are all of these channels that are mandated that they carry before they can carry anything else.

Senator GOLDWATER. What was the reason for that? Do you know?

Mr. GILLILAND. That was a rule that was imposed by the FCC in 1972, obviously broadcaster motivated, which said that you have to carry our signal, so you take those right off the top.

I have a solution for that. It is extremely simple and inexpensive. It provides substantial benefits to the consumer. I am holding here a simple A-B switch which I purchased at the Radio Shack for $4.95. It can be connected to a television set in 1 minute. One side can be cable programing, the other side can be off the air, just like that.

Senator GOLDWATER. I use one.

Mr. GILLILAND. That really will solve in many, many cases the channel capacity and the must-carry problem. If you do not have must-carry rules, you give these to your suppliers, and I would be happy to do that, and that would be a real solution to imposing must-carry rules on systems of 12-, 20-, 30-channel capacity, because you take these channels right off. There is no need for them. They can be gotten right off the air.

So in conclusion, all the cable television industry is seeking is parity. We are willing to compete with all of the broadcast services, but we believe that we can only do so when every horse is carrying the same amount of weight. Federal must-carry requirements provide unnecessary protection to television broadcasters while reducing the diversity of programing and other services that cable can offer because it takes channels away.

I have always supported the concept of free competition in the marketplace. All I would ask is that we be on a free and competitive basis with all of our competitors.

Thank you.

[The statement follows:]

STATEMENT OF ALLEN T. GILLILAND, CHAIRMAN, NATIONAL CABLE TELEVISION ASSOCIATION

Good morning. Chairman Goldwater, Members of the Subcommittee, my name is Allen Gilliland and I am President of Gill Cable, a company which operates a 92,000 subscriber cable television system in San Jose, California. In addition, for the past year I have had the privilege of serving as the Chairman of the National Cable Television Association.

I am particularly indebted to you, Mr. Chairman, for introducing S. 2172 and for holding these hearings on a subject which is absolutely essential to the survival and future development of the cable television industry.

Having worked in the telecommunications business for the last 20 years, I have witnessed first hand the emergence of cable from the shadow of traditional, off-the-air television—the FCC has always referred to cable as "ancillary to broadcasting"—into a dynamic communications medium in its own right. However, as much as cable has changed, especially during the past five years, we continue to face serious problems which may prevent cable from becoming, in the words of S. 2172, "a medium which will be responsive to and serve the needs and interests of the public." Mr. Chairman, as an entrepreneur who has risked substantial portions of his own money building up a cable television system, I would never ask the Congress for special favors or advantages which would give cable an unfair competitive edge; I do believe, however, that federal action is needed to see that the playing field is level so that we all may compete fairly and squarely.

In recent years, the federal government has at long last begun to remove the excessive and burdensome layers of red tape and regulations which were slowly strangling the American economic system. This Committee has played a key role in the process by initiating many innovative steps to deregulate the communications business; you are to be applauded for this. Unfortunately, as our competitors are being deregulated and allowed to compete more vigorously in the open market, cable television is being re-regulated—if you will allow me to coin the term—by state and city governments intent on treating cable television as if it were as vital and essential to the well-being of their citizens as public water, electricity or telephone service.

I hope you will not underestimate the degree to which municipal demands on cable systems are escalating. Many cities are now demanding 5% of a cable systems' gross—not net—revenues for giving the operator the privilege of risking tens of millions of dollars of private capital to provide a city with cable television. Many cities are seeking the right to control the rates we charge for the products we sell, are requiring the outright donation of channel capacity for public use and reserving the right to demand even more channels in the future. Why do cable operators give in to these sort of excessive demands? Simply because a city exercises monopoly control over an essential requirement for any cable system—the public rights of way—and they use that monopoly power to demand, and receive, monopoly prices for access to those rights of way.

Yet at the very time cable is being exposed to increasingly expensive regulation at the local level, the federal government is deregulating the rest of the broadcast industry. STV, DBS, Satellite-fed Master Antenna Television, low-power television, microwave and the like—all direct competitors of cable—are being set free and, indeed, encouraged to offer the American people a broad range of programming and enhanced services. There is one difference, however: state and local governments are forbidden by federal law from regulating our competitors. Cities may not demand free use of any Satellite-fed Master Antenna channels; they cannot take 5 percent off the top of a subscription television operator's revenues; they cannot regulate the rates of a MDS system. Lest I be misunderstood, I am not proposing that all of our competitors be subjected to municipal regulation; instead, I would ask that the federal government insure that cable is treated in the same manner as all those other important links in our national communications network.

The other problem I would like to discuss involves excessive federal regulation which is also not required of our competitors. Section 609 of this bill authorizes the FCC to set mandatory signal carriage rules. I recommend this section be deleted from the bill for two reasons.

First, the dispute over must-carry rules has been resolved as part of a comprehensive compromise reached by the NCTA and National Association of Broadcasters which is included in H.R. 5949, the cable copyright bill. That bill has already cleared the House Judiciary Committee and will be considered by the House Commerce Committee shortly. I would urge you therefore to hold off any action on the must-carry rules until H.R. 5949 clears the House and is in the Senate and this Committee for action. We would vigorously oppose an effort to give the must-carry rules any statutory basis absent the sort of comprehensive agreement reached in the cable copyright bill.

More importantly, reaffirmation of the must-carry rules by this Committee would run counter to the deregulation efforts you have been pursuing. Must-carry is but another example of an unnecessary regulation—this time federal rather than local—which is borne by cable television but not our competitors. While such rules may have had some logic in the days when cable was principally a broadcast retransmission service—ancillary to broadcasting if you will—there is no longer any justification.

Must-carry rules require that a cable operator provide channels to every broadcast signal that theoretically can be viewed in his service area before channels can be made available for a wide range of made-for-cable programming or even for public and community access. Providing channel capacity for off-the-air signals serves the broadcasters well: it limits the number of alternative cable programming the cable system can offer viewers, while expanding the broadcaster's market area and therefore his advertising revenues. Need I add that we must furnish this service to broadcasters absolutely free of charge. For many systems, especially those in hyphenated markets, it is not unusual to have ten or more must-carry signals. For example, I have brought along a chart which shows the 16 signals I must-carry on my San Jose system. Note that seven signals receive no viewership at all, while several others have an insignificant share. In all, 11 out of the total 16 must-carries—or 68 percent—together attract only 9 percent of the total cable viewership of broadcast television. Those signals outlined in yellow are those which we could replace under the terms of the cable copyright bill, H.R. 5949.

The solution, Mr. Chairman, is extremely simple, extremely inexpensive, well within our technological abilities and—best of all—would provide substantial benefits to the consumer. I am holding in my hand a simple device I purchased from Radio Shack here in Washington for $4.95. It's called an "A-B" switch and it can be connected to any television set in a matter of a minute or two. What it does is to switch back and forth—on the consumer's demand—between a cable and a normal television antenna (either an outside antenna or rabbit-ears). This way the consumer can watch all the made-for-cable programming that cable offers, then, with a flick of the switch, watch all the traditional over-the-air television broadcasts as well. What could be simpler? Television broadcasters could continue to reach viewers in the way they always have—through over-the-air signals—while cable could provide different programming over the cable. Why force all the duplication of programming the must-carry rules require? Why force small cable systems to spend millions of dollars rebuilding 12 or 20 channel systems merely to create the extra channels needed to provide made-for-cable programming? Many of these systems would have sufficient capacity today if it were not for all the must-carry signals. Needless to say, it is the cable viewer who will ultimately have to pay the cost of rebuilding some of these smaller systems when most of those costs could be avoided with the installation of these $4.95 "A-B" switches. I would buy and install them for all my customers free of charge!

In conclusion, all the cable television industry is seeking is parity. We are willing to compete with all these new broadcast services, but believe that we can only do so when every horse is carrying the same weight. City regulation of cable, but not of our competitors, is unfair to us and unfair to the consumer. Federal must-carry requirements provide unnecessary protection to television broadcasters, while reducing the diversity of programming and other services cable can offer the consumer. I have always supported the concept of free competition in the market place; I would only ask that this Committee allow us to compete in that market place under the same conditions as the many other providers of telecommunications services.

Thank you for your attention, and I will be happy to respond to any question you may have.

GILL CABLE TV, SAN JOSE, CALIF.

16 "Must Carry" Stations	Viewing share	
	All	Noncable
KGO (A) San Francisco	25	28
KPIX (C) San Francisco	20	21
KRON (N) San Francisco	18	18
KTVU (I) Oakland	13	13
KNTV (A) San Jose	10	8
KBHK (I) San Francisco	4	4
KQED (E) San Francisco	3	4
KICU (I) San Jose	2	2
KTEH (E) San Jose	0	1
KQEC (E) San Francisco	0	0
KSTS (I) San Jose [1]	0	0
KDTV (I) San Francisco [1]	0	0
KTZO (I) San Francisco [1]	0	0
KTSF (I) San Francisco [1]	0	0
KVOF (I) San Francisco [1]	0	0
KCSM (E) San Mateo [1]	0	0

[1] Can be deleted under H.R. 5949.

Senator GOLDWATER. Thank you very much.

I have to apologize. We have a vote coming up. In fact, we have a live quorum call now. I am going to have to leave for a few moments, but we will continue and the staff will do the questioning. I will be back just as soon as I can hobble over and get her done.

Mr. JORDAN. I will not say "Senator Goldwater" now. Should I say "Chris Coursen"?

Mr. COURSEN. No, please continue to address our comments to the chairman.

Mr. JORDAN. My name is Tony Jordan. I am a city councilman in Raleigh, N.C., and am chairman of the council committee coordinating Raleigh's cable refranchising efforts. Of course, I am pleased to appear before the committee to speak to aspects of S. 2172.

The city of Raleigh is right in the middle of a long process leading to renegotiating our cable television franchise. I am concerned that if this Senate bill is passed as currently written much of the work that has been done in Raleigh to determine appropriate cable services, such as access channel requirements, will be wasted.

To be specific, our concern is that if provisions of this bill wind up preempting State and local jurisdiction in the area of cable access channels, the citizens of Raleigh will be deprived of the use and enjoyment of much of the access programing and channels that a thorough community ascertainment has shown to be appropriate in our city.

More generally, the provisions of this bill are seen as preemptive of State and local jurisdiction, I believe that local governments would be prevented from acting in the best interests of their citizens.

My comments, therefore, have to do with section 603, paragraph 1, and section 606 of the bill. I certainly commend the subcommittee for its efforts in addressing many of the crucial but complex and controversial issues in cable television. In particular, I am pleased that this bill recognizes the very important topic of access channels and has made an attempt to mandate certain requirements for their existence.

My concern, however, is that this bill will severely limit local government's role in determining the provision and administration of access channels.

My understanding of section 606(a) of this bill is that for cable systems with 20 or more channels, 10 percent of the channels must be set aside for public and educational and governmental channels and 10 percent set aside for leased access. However, the dedication of these channels is provisional in case of available alternatives as determined by the FCC.

Also, in section 606 paragraph (c) use of these public educational, governmental access channels will be on a nondiscriminatory first-come, first-served basis. My understanding also of section 603(b) paragraph (1) is that it may well preclude local and State jurisdictions in the areas of rate regulation, access, ownership, and franchise fees.

If I understand this bill correctly, the 10-percent requirement for access channels is a minimum and a maximum. For example, in Raleigh we are hoping to renegotiate a franchise that will see us go from a 12-channel system to a 54-channel system. If this bill were in place, we could have at most only five or six channels for public, educational, and governmental access.

Second, if the cable operator in Raleigh felt that it did not want to set aside these channels, the FCC would have to determine if there were reasonable alternatives to these access channels.

Third, section 606 paragraph (c) would prevent a locally appointed access organization from overseeing access use to insure fair representation and use of access channels because of the nondiscriminatory first-come, first-served clause.

Let me elaborate on 606(a) of this bill. This section sets not only a minimum but a maximum on the number of these access channels. I believe this is unwarranted preemption of local government jurisdiction. In Raleigh we have been served by a traditional 12-channel cable system for the past 15 years. The city is now seeking a new franchise agreement that will bring Raleigh up to the more modern cable system in operation today.

One very important feature of the new cable system is the access package. The access package is a combination of the cable channels, facilities, and studios, equipment, personnel, and funding that a cable system dedicates to access. The modern cable access packages that have been negotiated recently have been mainly in the cities where new franchises were bid.

Competition for these franchises among cable operators is largely responsible for these recent access packages. Unfortunately, in a refranchising situation such as Raleigh, there is no competition among competing bidders. Consequently, it is up to the city to determine its needs, present and future, and come up with its own proposed access package.

In Raleigh, with the guidance of our cable television consultant, we have undertaken extensive ascertainment procedures to aid us in our access package development. First, an explanatory letter and questionnaire went out to all identifiable individuals or groups that were potential users of public, educational, and government access. Later, a public meeting was held to explore further with all interested parties the issue of access and how provisions of an access package could be incorporated into the city's overall refranchising effort.

The tremendous public response we have gotten from these efforts has led to the formation of a council of appointed citizens committee on cable access that will develop closely with our consultant and the city council for developing our access plans.

In particular, we expect this access committee to help us formulate our access needs in terms of channels, facilities, and administration. As I indicated before, we are in the middle of this ascertainment process. It is at present unclear, for example, the number of channels that will be deemed appropriate.

But just as an example, our local school board has put forward a very thorough proposal that demonstrates a need for and utilization of a 42-channel educational cable loop for the schools. It is not certain by any means the city will request 42 channels for the public school system, but we will certainly consider the proposal.

What I have described above are just some of the many steps that we in Raleigh are taking to insure that the cable system that serves Raleigh for the next 10 to 15 years includes an access package that is appropriate for the citizens of our city.

I believe and urge that the cities, using procedures they deem appropriate, be allowed to study and negotiate for access packages that they consider to be right for their community.

I recommend, therefore, that section 606 paragraph (a) calling for 10 percent of the channels set aside for access be used only so that if a city determines that if it needs more than 3 channels of a 35-channel system or 5 channels of a 54-channel system, it could legally negotiate for them.

Furthermore, I strongly urge that section 603 paragraph (1) be revised so that the provisions in this bill allow for State and local jursidictions in the area of access in particular. It is my sincere belief that the local governmental body, acting in the best interests of its citizens, can do the best job of ascertaining and judging what is appropriate for its citizens in the area of cable television. Thank you, sir.

Mr. COURSEN. Mr. Blanchard.

Mr. BLANCHARD. Thank you, Mr. Chairman. I am president of Mogollon Cable Television. Several of my cable systems serve a subscriber base of 80 subscribers, with the largest of my systems serving 500 subscribers.

As an owner/operator that services nonurban communities, I would like to offer some comments on section 605(3) subsections (d) and (e) of S. 2172 that deals with Telco/cable cross ownership. I strongly support cross ownership restrictions, as I believe that without that protection, some predatory telephone companies would abuse their business position in an attempt to control all of the communication to the rural home.

I also had previously supported the concept of allowing acceptance of this rule in rural areas if a change was made in the definition of "low density" from 30 homes per mile to 10 homes per mile. However, after examining this issue in some depth I find the basic concept of cross ownership of Telco in their service area to be irrevokably flawed. I am now convinced that there must be a total restriction from a utility company, with their guaranteed rate of return on investment from becoming involved with a cable TV in their service area, for one very fundamental reason: It would be impossible to totally stop the utility from cross subsidizing the cable TV operations from their Telco customer revenues. This is true because cable TV uses the same hardware—strand, anchors, pedestals, bolts, clamps—the same type of construction personnel and techniques, same type of service, vehicles, and the same conduit, poles, and trenches.

Only cable and electronic devices differ between the two operations, and this represents less than 20 percent of the investment required to build a cable system. Unfortunately, these items are the only ones that can be clearly identified as belonging to cable TV on any audit. Thus, any attempt to control cross subsidization depends largely on the integrity of the Telco involved, a concept that cable TV should not be forced to compete with.

Contrary to statements I have heard, there now is no shortage of companies and resources to build cable systems in the small communities that are often referred to as "Rural America," if these companies are given a fighting chance that does not involve direct competition with Telco and their financial resources.

Now, if, however, cross ownership cannot be totally eliminated in low-density areas, at least the definition of "rural" should be clarified and not left to FCC discretion. Currently, they define "rural" as being less than 30 homes per mile. My existing systems average 16.6 customers per mile, and certainly are not considered rural by the people who live there. My recommended break point would be less than 10 homes per mile. This would allow cross ownership exceptions in truly rural areas.

In addition, I am concerned with the mandated access requirements found in section 606 of the bill. As an operator who services very small communities with a 21-channel system, I am concerned that this provision will require me to reserve channel space that is unneeded and unwanted by small government and educational agencies. If this requirement only ties up 1 empty channel while waiting for access use, that 1 channel represents a substantial restriction on programing on a 21-channel system's ability to provide comprehensive subscriber programing.

In some of the communities that I service, my 80-subscriber base cannot possibly justify an access channel. In my community and other small communities nationwide, there has not been a demonstrated need for access programing.

I believe that if the need is there for public access programing, such needs will be met by the operator in the interest of good public relations. I know of no operator who would deny an access channel if that community wanted to regularly use that channel for public benefit. This is just good public relations between the cable company and the community it serves, which every operator attempts to foster.

Now mandating public access or leased access channels should not be the role of the Federal Government, but should be left up to the dictates of the local licensing authority and the operator. It is only good business sense for any operator large or small to follow the dictates of his customers. If his subscribers want public access and leased access programing, it will be provided by the operator.

In conclusion, owning and operating a small cable system in areas outside urban centers presents unique problems and concerns. It was, however, rural America that cable television had its beginnings. And I urge you, as you continue to consider S. 2172, to look at my unique problems as a rural operator and consider the ramifications of several of the provisions of this bill on my system and its subscribers. Thank you.

[The statement follows:]

STATEMENT OF JACK BLANCHARD, PRESIDENT, MOGOLLON CABLE TV CO.

SUMMARY

As an owner/operator of a small rural system, I believe that Telco/cable across-ownership restrictions as found in Section 605 (3)(d) and (e) are much needed; however, I believe that subsection (e) should contain a definition of low population density that would be used in considering cross-ownership exceptions.

I also believe that mandating public access and leased access channels put an unnecessary burden on the small system operator and, therefore, should be left to the individual licensing authority and cable operator to negotiate.

Thank you, Mr. Chairman.

I am President of Mogollon Cable TV Company which services the rural Arizona communities of Pine, Strawberry, Kohls Ranch, Christopher Creek and Black

Canyon City. Several of my systems serve a subscriber base of 80 subscribers with the largest of my systems servicing 500 subscribers.

As an owner/operator that services non-urban communities, I would like to offer some comments on Section 605(3) subsections (d) and (e) of S.B. 2172 that deals with Telco/cable cross-ownership. I strongly support cross-ownership restrictions, as I believe that without that protection, some predatory telephone companies would abuse their business position in an attempt to control all of the communication to the rural home.

I also support the concept of allowing acceptance to this rule in areas that dictate such a need. However, I am concerned with the failure of the bill to delineate a definition of low population density that would be used in determining exceptions to the cross-ownership restrictions. Currently, subsection (e) of Section 605(3) leaves that definition up to the discretion of the FCC. The current definition of low population density that is used to determine cross-ownership waivers is the figure of 30 homes per mile. In my opinion, this figure does not accurately reflect the demographics of a truly rural area. Several of my systems that service small communities have only 15 homes per mile within the city or town limits. I do not believe that the town population pockets in my area should be considered rural and, therefore, subject to cross-ownership exceptions.

Many of the developing areas outside the city limits are large urban areas, such as Phoenix and Tucson, and fall below the range of 30 homes per mile. Although, ultimately in the next five (5) years as development increases, they will become highly populated urban areas. Under the current FCC definition, however, these areas would be subject to cross-ownership exceptions. Therefore, I would advocate that subsection (e) of Section 605(3) should include a definition of low population density that uses the figure less than 10 homes per mile. This would allow cross-ownership exceptions in truly rural areas.

In addition, I am concerned with the mandated access requirements found in Section 606 of the bill. As an operator who services very small communities with a 21-channel system, I am concerned that this provision will require me to reserve channel space that is unneeded and unwanted by small government and educational agencies. If this requirement only ties up one empty channel while waiting for access use, that one channel represents a substantial restriction on programming on a 21-channel system's ability to provide comprehensive subscriber programming.

In some of the communities that I service, my 80 subscriber base cannot possibly justify an access channel. In my community and other small communities nationwide, there has not been a demonstrative need for such access programming. I believe that if the need is there for public access programming, such needs will be demonstrated at the time of the issuance or re-issuance of a license. Thus, the issue of access programming will be part of the license negotiating process.

Mandating public access or leased access channels should not be the role of the federal government but should be left up to the dictates of the local licensing authority and the operator. It is only good business sense for any operator, large or small, to follow the dictates of his customers. If his subscribers want public access and leased access programming, it will be provided.

Owning and operating a small cable system in areas outside urban centers presents unique problems and concerns. It was in rural America, however, that cable television had its beginnings. I urge you, as you continue to consider S.B. 2172, to look at my unique problems as a rural operator and consider the ramifications of several of the provisions of this bill on my system and its subscribers.

[The following information was subsequently received for the record:]

ARIZONA CABLE TELEVISION ASSOCIATION,
Phoenix, Ariz., May 17, 1982.

Hon. BARRY GOLDWATER,
U.S. Senate,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR GOLDWATER: It was indeed an honor and a priviliege to be invited to submit testimony at your Subcommittee Hearings on S.B. 2172 last week. Contributing, even in a small way, to our great political process awakens one to the delicate balance that often must be measured by persons like yourself in attempting to generate meaningful legislation. Your courage in tackling a revision in the 1934 Communications Act is commendable as is the resulting bill that you have brought forth for our comments.

I am taking this opportunity to submit additional comments on what was not brought out in verbal testimony at the hearing and the rebuttal thereto. These remarks on S.B. 2172 are meant to be constructive criticisms that I am hopeful will merit consideration in any revisions you deem advisable after the hearings are concluded. If, after reading my testimony and the comments on the testimony of others your office deems it necessary, I will provide any supporting documentation that you may find useful.

Sincerely,

JACK W. BLANCHARD,
President, Mogollon Cable TV Co.

Enclosure.

ADDITIONAL COMMENTS ON TELCO/CATV CROSS-OWNERSHIP

Testimony by Mr. Kenneth Brannies brought forth clear evidence of the cross-subsidy problem that exists when Telco is allowed to build and operate cable television systems in their service area. Mr. Brannies testified that his company, using government subsidy through REA financing, has built cable systems with FCC authorization. The construction and operation of these CATV systems using REA funding and the guaranteed return on investment of the company's utility status seems to me to be a clear indication of why Telco must not be allowed to compete in this marketplace. Clearly, the cable systems are built at public (government and utility company customers) expense for the sake of a few. This competes unfairly with the entrepreneurial atmosphere that the rest of the cable television market operates in. We only ask for a fair chance to operate; however, this is clearly not a fair chance when subisidies like this are made available to a selected few at the expense of all of us. Clearly, we are being forced to finance our own demise with the aid of the FCC.

In Arizona, this type of cross-subsidization would be illegal and I can only conclude that Texas must operate under different laws that allow this type of financial maneuver since Mr. Brannies seemed quite proud of their achievements. Clearly, these differences illustrate why Federal preemptive action is necessary.

ADDITIONAL COMMENTS ON S.B. 2172

Legislation passed in 1978 authorizes the FCC to serve as the arbitration between cable television and the utility companies when a cable TV company believes the pole attachment rates they are being charged are excessive. The FCC has been requested to review and set new pole attachment rates in numerous cases since being granted this authority. They have performed this job well and the decisions they have rendered clearly illustrate the problems that would be allowed to continue if no higher authority other than the state existed. Arizona's pole attachment rate problem is a good example of the problem that exists in several states. Arizona's case has been submitted for FCC arbitration in an attempt to obtain an equitable pole rate which clearly would not be possible without the FCC. Other states have similar problems but have not yet asked for FCC arbitration. These states are sure to feel abandoned by S.B. 2172's failure to address the pole attachment rate problem. We, in Arizona, also will feel abandoned if we are unable to get our problem resolved by the FCC prior to 1983 when the FCC's authority is scheduled to be eliminated.

Prior to last year, Arizona's pole attachment agreements were called "tri-lateral agreements" because they were a single argument that covered cable TV's attachment to poles owned by Arizona Public Service Company (APS) or owned by Mountain Bell. The contracts and collection of pole attachment fes were administered by Mountain Bell. The cable TV companies were charged $4.00 per pole per year. While this rate was considered high by many companies, nobody attempted to challenge it until APS decided to change the arrangement, presumably, because of a dispute with Mountain Bell over pole attachment contracts between these two companies. The result was an announcement by APS that they were canceling all tri-lateral agreements and would replace them with new bi-lateral agreements. While the words in the new contract, were different, the intent was the same except that the new pole attachment rate was set at $11.77 per pole year with provisions for a yearly rate adjustment based on their cost of doing business.

Meetings between the cable companies, APS and our state cable television association (ACTA) have been fruitless in achieving a compromise pole attachment rate. Thus, ACTA and several companies in Arizona petitioned the FCC for their intervention. At this point, the Arizona State Corporation Commission intervened and advised the FCC that they were assuming jurisdiction and would arbitrate the pole attachment rate. ACTA promptly challenged this action in court as not being an authorized function of the State Corporation Commission. APS joined the Corporation Commission in defending this suit. A Superior Court decision agreed with us and forced the Corporation Commission to return all documents back to the FCC. Currently, the request stands before the FCC for their review and subsequent decision. We hope this action can be concluded prior to the expiration of the FCC's authority. If not, we are convinced that we will be at the mercy of an unscrupulous utility and, if they have their way, will get legislation passed at the state level to return authorization for rate review to the State Corporation Commission who are sympathetic to their desires to have cable television subsidize the utility through excessive pole attachment rates.

We in Arizona have hopes that we can get our problem resolved prior to expiration of the FCC's authority in this matter. Other states, like New Mexico, may not be as lucky as evidence presented by Tom Staubitz at the hearings clearly illustrates.

In view of these problems at the state level, it is clear that here is a point where federal intervention is necessary so that decisions can be rendered at "arms length" without the local influences to bias the results.

The current pole attachment rate of $10.56 per pole per year charged by APS to my company was the highest rate in the country being charged by a public utility company (some co-ops charge more). In the low density areas where we operate, we use an average of one pole per customer when we build an aerial cable system. This means that nearly 10 percent of our gross income goes directly to the utility company for pole rental. For this reason, we often are forced to build underground cable systems to minimize the recurrent yearly charge. When pole rates have been established by the FCC, they normally fall in the range of $1.20-$2.00 per pole per year, i.e., ⅒ to ⅕ that is currently being charged.

It takes no financial genius to recognize the hardship that these high pole attachment rates cause to a small company attempting to build cable systems in low density areas. Clearly, rates like the above are abusive and contribute significantly to the reason why you often hear the statement that cable television companies are reluctant to build in "Rural America".

Mr. **Coursen**. Thank you, Jack.

Now, Mr. Max Kiburz, Loup River Public Power District.

Mr. **Kiburz**. I am Max Kiburz, and I am presenting this statement on behalf of Loup and APPA.

It is predicted that by 1983 nearly one out of every three American homes will receive cable television. Consequently, this piece of legislation on cable TV will affect a great many people and will have a significant effect on all segments of society involved in cable TV.

Public Power Systems are units of local government and are owned by their consumers. Currently, there are more than 20 municipally owned cable TV systems in towns with local publicly owned electric systems.

Interest in public ownership of cable systems is increasing in public power communities. Basically, a nonprofit cable communications system fits in well with an electric system. There is the same fundamental philosophy of low rates, efficient service, and citizen participation. Public ownership means the system is service oriented rather than profit oriented.

In addition, the community's technical expertise in running a municipal electric system is transferable to a cable system. The electric system already has the in-house technical capability. Ownership of rights-of-way and electric utility poles is an added advantage for public power systems going into cable.

Some public power systems, such as Loup River District, are separate entities from cities. We supply electricity to 21 towns and 4 counties in Nebraska. Some of the future uses of cable television will tie in closely with an electric utility operation. For example, meter reading and load management are areas where cable TV systems could be used in the future.

The incremental cost of providing these services over a cable TV system appears to be much less than other ways of providing these services. The joint use of these facilities would be an efficient operation and beneficial to both groups of customers.

Load management offers the advantages of substantial savings to our ratepayers both today because of reduced electrical demand and in the future by delaying the need for expensive new power resources.

The cable system is a superior method of transmitting the information required for a load control system and is considerably less costly than alternate systems. Nebraska is the only State in the United States where all electric services is supplied at cost to consumers by public agencies. No one can dispute that this has been good for the electric users in Nebraska.

Only 4 or 5 towns out of the 24 towns in our area have cable TV service. This is because many of these towns are relatively small, and the cable TV companies have not been beating down their doors to provide cable TV service. I feel we could provide the necessary service by bringing cable TV service to many of these towns at a reasonable rate since the service would be furnished at cost.

The Telecommunications Act addresses the issues of municipal ownership, rate regulation, and franchise fees. I would like to discuss briefly the general concepts of interest to APPA. We are happy to see that S. 2172 contains no provisions to place pole attachment fee agreements between public power systems and cable operators under FCC jurisdiction. We feel there is no justification for Federal jurisdiction over what is strictly a local matter.

With respect to ownership, APPA believes States and localities have a fundamental right to own cable TV systems and any legislation to prohibit this right would be unconstitutional.

We are pleased that the ownership provision of the bill prohibits any entity from restrictiong ownership of cable. However, section 605(c) states that a political subdivision may not own or acquire ownership in a cable system unless it acquires it at not less than fair market value.

This section could be interpreted to mean that a locality cannot originally own a cable TV system. The language should be clarified to make certain municipal ownership is not prohibited.

On the matter of rates, APPA believes it is part of the municipal function whether the city owns the cable system or grants a franchise to a cable system to regulate the rates charged for the cable service. Regulation of cable rates is a basic tool that municipalities or franchising authorities have to make sure cable companies provide the service they promise before they obtained a franchise.

In addition, the regulation of rates is an essential role that cities play in protecting the public interest. In closing, I would like to say that we appreciate this opportunity to testify before this committee. We reiterate our support for municipal ownership of cable, local rate regulation and franchising, and local regulation of pole attachment fee agreements. There are substantial tie-ins between public power systems and public cable systems, and many of our members are exploring the feasibility of establishing public cable systems. Thank you.

[The statement follows:]

STATEMENT OF MAX KIBURZ, GENERAL MANAGER, LOUP RIVER PUBLIC POWER DISTRICT AND AMERICAN PUBLIC POWER ASSOCIATION

My name is Max Kiburz. I am general manager of the Loup River Public Power District of Columbus, Nebraska, and past president of the American Public Power Association. I am presenting the statement on behalf of Loup and APPA. The American Public Power Association is the national service organization representing more than 1,750 local publicly owned electric systems throughout the United States. We are pleased to have an opportunity to testify on this very important legislation, S. 2172, the Cable Telecommunications Act of 1982. It is predicted that, by 1983, nearly one out of every three American homes will receive cable television. Consequently, this first piece of comprehensive legislation on cable TV will affect a great many people and will have a significant impact on all segments of society involved in cable TV.

PUBLIC POWER'S INTEREST IN CABLE SYSTEMS

Public power systems are units of local government and are owned by their consumers. Currently, there are more than 20 municipally owned cable TV systems in towns with local publicly owned electric systems. Interest in public ownership of cable systems is increasing in public power communities.

Basically, a nonprofit municipal cable system fits in well with a publicly owned electric system. There is the same fundamental philosophy of low rates, efficient service and citizen participation. Public ownership means the system is service oriented rather than profit oriented. In addition, a community's technical expertise in running a municipal electric system is transferable to a cable system. The electric system already has the in-house technical capability. Ownership of rights-of-way and electric utility poles is an added advantage for public power systems going into cable.

In towns with public power systems, it is usually the public power system that first becomes involved in looking at the feasibility of a municipally owned cable system. In addition to common technical expertise, cable can be used as a means of obtaining better load control for the system, energy management, meter reading, automation of transmission and distribution functions, and other programs that complement electricity services.

Some public power systems, such as Loup River, are separate entities from cities. We supply electricity to 21 towns in 4 counties. Recently, I presented testimony to the Nebraska State Legislature on cable television. I examined some of the future uses of cable television which tie in closely with an electric utility operation. For example, meter reading and load management are areas where cable TV systems could be used. The incremental cost of providing these services over a cable TV system would appear to be much less than other ways of providing these services. The joint use of these facilities would be an efficient operation and beneficial to both groups of customers.

Load management offers the advantage of substantial savings to our ratepayers both today—because of reduced electrical demand—and in the future—by delaying the need for expensive new power resources. The cable system is a superior method of transmitting the information required for a load control system and is considerably less costly than alternate systems.

Nebraska is the only state in the United States where all electric service is supplied at cost to the consumers by public agencies. No one can dispute that this has been good for Nebraska's electric users.

Loup Power District would like an opportunity to serve cable TV subscribers also because we feel the efficiency of the combined services offers advantages to both the electric users and the cable TV subscribers in addition to the advantages mentioned earlier, of providing the cable TV service at cost.

Only 4 or 5 out of the 24 towns in our area have cable TV service. This is because many of these towns are relatively small and the cable TV companies have not been beating down their doors to provide cable TV service. We feel we could provide a necessary service by bringing cable TV service to many of these towns at a reasonable rate since the service would be furnished at cost.

Public operation of cable TV systems is being conducted in 16 states at the present time, including our neighboring states of Colorado, Kansas, Missouri, and Iowa.

We are not asking for an exclusive right to do this, but only the right to offer this service to the cities, with the cities having the right to determine if they would prefer to have us or a private agency provide this service to their town.

There is no doubt in our minds about our ability to provide this service. We have people in our organization who have designed and built electronic equipment to allow monitoring, operation and control of various items at our Headworks and our Monroe Powerhouse from our Columbus Powerhouse. They are qualified in the electronic area.

I would suggest that this subcommittee give serious thought to the following points:

(1) Cable TV systems operate as a monopoly because of the large installation costs, and public ownership gives the people a decisive voice in their use and their operation.

(2) Nearly all parts of cable operations tie directly into an electric utility's operatons. Their combined operation creates efficiency and saving to both the cable TV customers and the electric customers.

(3) Public power systems could provide service in the smaller towns also where service has not been provided by other agencies.

(4) Service at costs to local cable TV customers is far superior to having the profits made by private cable systems transferred out of the locality.

The tie-in of a cable system with a municipal electric system, and the valuable revenues that can be returned to the city, is illustrated by Conway, Arkansas. The city-owned cable system, Conway Corporation, was established in 1980. It was financed with a $1.5 million surplus from the electric department, which the cable system will pay back over 25 years at a 7-percent interest rate. The electric system loaned an additional $200,000 which is being paid back in 3 years.

Gross cable revenue for the first year of operation is anticipated to be $450,000. Three percent of gross revenues will be returned to the city for the franchise payment, and 10 percent of gross revenues, less debt service, will go to the city as a lease payment. (The city owns the system and leases it to Conway Corporation.)

In addition to this type of financing, publicly owned cable systems may be able to use the same type of low-interest revenue bonds available for publicly owned electric systems.

Another example of public power involvement in cable is Shrewsbury (Massachusetts) Electric Light Plant, which is applying for a local cable television franchise. It is seeking the franchise because the utility's management feels that no other town agency is equipped to handle a cable system. In addition, the utility feels the community would be better served by a municipal cable system for the following reasons:

1. The electric system has business resources that could be used in operating a cable system, including office and warehouse space, staff, computerized billing capability, utility pole space, vehicles and technical equipment;
2. A municipally owned cable system would be nonprofit and tax exempt, contributing to lower costs for the community;
3. The major effect that a cable system will have on a community strongly supports the concept of local control.

In addition to the Massachusetts, Arkansas, and Nebraska public power systems referred to in this statement, there are others throughout the country that are considering municipal ownership of cable systems. Several members of the Senate Commerce Committee have cities in their states that are serviced by both municipally owned public power systems. These include:

Cascade Locks CATV, Cascade Locks, Oregon;
Unionville Cable Authority, Unionville, Missouri;
City of Cawker City, Kansas;
City of Marion, Kansas;
City of Sumas TV Cable system, Sumas, Washington;
Community Service, Incorporated, Frankfort, Kentucky;
City of Crystal Falls, Michigan;
City of Norway CATV, Michigan;
Wyandotte Municipal Service Commission, Michigan;
Opp Cablevision, Opp, Alabama.

CABLE POLE ATTACHMENT FEE AGREEMENT

APPA first became involved with cable communications bills because of the cable pole attachment fee agreements issue. Currently, FCC regulates pole attachment fee agreements between cable operators and electric utilities, if the states do not exert jurisdiction. However, public power systems are exempt from such federal regulations.

We are happy to see that the current bill, S. 2172, contains no provision on pole attachment fee agreements. We feel that there is no justification for federal jurisdiction over what is strictly a local matter.

APPA's reasons for opposing FCC jurisdiction of pole attachment fees include the following reasons:

(1) Congress has denied Federal Energy Regulatory Commission (FERC) jurisdiction over electric distribution by publicly owned systems, and it is inconsistent that another federal agency, FCC, should have jurisdiction over a secondary matter involving the same system.

(2) FCC jurisdiction over pole attachment fees imposes another layer of bureaucracy on issues which are local in nature based on local ordinances, safety requirements, climatic conditions, costs of poles and maintenance. It subjects local governmental matters to federal jurisdiction at a time when many commercial segments of our society are being deregulated, and when the Administration is advocating "new Federalism" or more state and local control.

(3) There are some 2,200 local public power systems in the United States. Three-fourths of this number are located in communities of 10,000 persons or less. The number of systems suggests a significant FCC workload. The relatively small size of the systems suggests difficulty in individual utilities coping with filings and proceedings before the FCC.

(4) In the case of communities with public power systems, local decision-making on questions involving pole attachments represents a balancing of interests. A local public power system, which is itself nonprofit in character, does not have an incentive to exploit cable systems. But it also has a responsibility to cover its costs. Charges for pole attachments are based on local utility costs, including such items as poles, safety requirements, and maintenance. Through city councils and boards, there is an opportunity for citizen participation as to how the balance should be struck, and a chance to weigh local factors on a local basis.

ISSUES CONCERNED IN THE TELECOMMUNICATIONS ACT

The Telecommunications Act of 1982 addresses the issues of municipal ownership, access, franchise fees, and rate regulation. Before going into specifics of the bill, we will briefly discuss the general concepts of ownership, rate regulation, and franchise fees.

Ownership

The proposition that public ownership of cable systems should not be allowed will no doubt be presented to this subcommittee. Such a proposition involves three basic questions:

(1) Whether states and localities have a fundamental right to own certain businesses;

(2) Whether Congressional power to regulate under the Commerce Clause of the Constitution is limited by other provisions in the Constitution;

(3) Whether First Amendment problems preclude public ownership.

With respect to whether states and localities have a basic right to own businesses, the courts have stated that they do. In 1934, the Supreme Court ruled that states and municipalities can "constitutionally engage in a business commonly carried on by private enterprise, levy tax to support it, and compete with private interest engaged in a like activity" *Puget Sound and Light Company* v. *City of Seattle*, 291 U.S. 619, 624 (1934).

The fundamental rights of states and localities to own businesses has been established by the Supreme Court in various cases based on the concept of the Tenth Amendment reservation of sovereign powers to the states.

With respect to the second question, under Article I, Section 8 of the Constitution, Congress has the power to regulate interstate commerce. The scope of the commerce power has been interpreted very broadly. However, one of the limitations on the commerce power is the Tenth Amendment reservation of states' power.

In *Fry* v. *United States*, 421 U.S. 542 (1975), and *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Supreme Court laid down a test determine if federal interference with states' powers were constitutional. First, a compelling federal need has to be shown, and secondly, the federal scheme cannot impair the states' ability to function effectively in a federal system. The banning of municipal ownership would not meet this test since municipal ownership would not threaten a federal scheme any more than would private ownership.

There is also an equal protection limitation on the Commerce Clause. The Fifth Amendment provides that no person can be deprived of property without due process of law. The Fourteenth Amendment which applies only to the states guarantees equal protection of the law. The equal protection provision of the Fourteenth Amendment applies to the federal government through the due process clause of the Fifth Amendment.

Under an equal protection test, when a federal law involves fundamental rights, the court looks at the law with strict scrutiny. The government would have to show a compelling federal need to discriminate against localities, and would have to overcome a strong presumption of unconstitutionality. If Congress were to ban the fundamental property right of a state or locality to own a cable system, such a law would not satisfy the strict scrutiny test.

With respect to violation of First Amendment rights, under the First Amendment, the government, whether local or national, is prohibited from restricting speech because of its content. To overcome any argument of government control of content, most cities have set up independent programming boards with membership from a broad cross-section of citizens. For example, in Conway, Arkansas, a 16-member program committee was established by city ordinance. It includes the mayor, three people named by the presidents of the local colleges and university, one member selected by the Conway Ministerial Alliance, another by the School Board, eight appointed by eight aldermen, the chairman of the utility committee, and the manager of the Conway Corporation.

A recent decision by the Washington State Supreme Court has reinforced the concept that municipal ownership of cable systems is not a violation of First Amendment rights. In *City of Issaquah* v. *Teleprompter Corporation,* the Court ruled that municipal ownership of a cable television system would not be held to violate the First Amendment in the absence of showing of actual governmental censorship.

Rate regulation

On the matter of rates, APPA believes it is part of the municipal function, whether the city owns a cable system or grants a franchise to a cable system, to regulate the rates charged for the cable service. Regulation of cable rates is a basic tool that municipalities of franchising authorities have to make sure cable companies provide the service they promised before they obtained a franchise. In addition, the regulation of rates is an essential role that cities play in protecting the public interest.

Franchise fees

Franchise fees are fees cities charge cable operators for the use of the public rights-of-way. Since 1972, FCC has imposed a ceiling on franchise fee of 3 to 5 percent. The current bill, S. 2172, would allow the Commission to establish reasonable ceilings. At a time when more power is being returned to state and local govenments, it would appear that the local rights-of-way are a local matter, and a federal agency should not have the power to limit basic state and local fees which are actually taxing powers.

ANALYSIS OF CERTAIN SECTIONS OF S. 2172, CABLE TELECOMMUNICATIONS ACT OF 1982

APPA's comments on specific sections of the bill follow:

Section 603. Statement of authority

The Federal Communications Commission's (FCC) scope authority is set out in Section 603. It provides FCC will have exclusive jurisdiction in several areas, preempting state and local laws in those areas. Federal regulation would pertain to issues of ownership, access, rate regulation, and franchise fees. Localities are prohibited from making "rules or policies regarding the matters dealt with in" the bill.

Section 603 (1) provides:

"The Commission shall have jurisdiction and exercise authority with respect to cable systems solely as specified in this title. Commission jurisdiction under this title is exclusive and no other Federal or State instrumentality or agency or any political subdivision thereof shall make or establish rules or policies regarding the matters dealt with in this title."

Under the language of this section, the Commission's authority could be interpreted broadly or norrowly. If interpreted broadly, the section would mean that FCC has jurisdiction over any and all regulatory actions in those four general areas of ownership, access, rate regulation, and franchise fees. If interpreted narrowly, FCC would have authority only in those areas specifically authorized. The second sentence specifically prohibits states and localities from making "policy regarding the matters dealt with" in the bill, which seems to negate the first sentence which gives the

Commission authority "solely as specified" in the bill. The question is, does the second sentence mean all matters dealt with or only portions that are specified as under FCC jurisdiction?

So that there is no misinterpretation of the language, and in order to clarify this section so that it will be construed narrowly, the language should enumerate those specific areas where FCC will have sole jurisdiction.

Paragraph two of Section 603 interrelates with paragraph one.

Section 603(2) provides:

"Any cable system shall be subject to the provisions of this title and such orders, rules or regulations as may be adopted pursuant thereto and any Federal rule, regulation, order, or standard applicable to cable systems shall, to the extent inconsistent with the provisions of this title, be null and void."

Depending on how far the first paragraph extends FCC jurisdiction, agreements between municipalities and cable operators which encompass an area under FCC jurisdiction would be "null and void." To what extent would this allow the franchise to be operative, while negating the terms of the franchise agreement? If the cable operator would retain its franchise, there would be no incentive for the cable system to renegotiate the terms of the contract with the cities. In other words, the cable system would have the franchise, without the burden of carrying out its bargains.

Section 605. Ownership of control of cable systems

The ownership provisions of the bill are contained in Section 605. Section 605(a) prohibits any entity from restricting the ownership of cable systems by any person. This broad prohibition against restricting ownership is then qualified by three sections pertaining to ownership by municipalities, foreign corporations, and telephone companies.

Section 605(a) provides:

"Except in the case of the antitrust laws of the United States and to the extent otherwise provided in subsections (b), (c), and (d) of this section, no executive agency of the United States, including the Commission, and no State or political subdivision or agency thereof, including a cable franchising authority, shall have the authority to prohibit, or *otherwise regulate*, the ownership of cable systems by any person." (Italics added.)

The phrase "or otherwise regulate, the ownership of cable systems" could go to the essence of the franchising process. Franchises do, to an extent, regulate the ownership of cable systems. To protect the cities' rights to franchise, it would be preferable to strike the words "or otherwise regulate" or to insert language that the prohibition against regulation of ownership does not include franchising.

In addition to subsection (a) which could be interpreted to strike a franchising agreements, there are several problems of interpretation in Section 605(c) regarding municipal ownership. This subsection refers to a municipality's ability to own a cable system by acquiring it at fair market value. It does not address the instance where the locality would establish the system in the first place without acquiring it from another entity, and, in fact, seems to preclude a municipality from establishing a cable system.

Section 605(c) states:

"* * *a State or any political subdivision or agency thereof may not *own* or acquire an ownership interest in any cable system, unless such State, subdivision, or agency acquires such ownership or interest at not less than fair market value and not by condition of franchise unless the franchise provides for purchase at fair market value." (Italics added.)

If this subsection refers only to acquiring ownership, then the first "own" should be omitted. As it is now written, this language could be interpreted to mean that a locality cannot originally own a cable system.

Secondly, the requirement that the cable system be acquired at fair market value is contrary to traditional buy back provisions in franchise agreements. Most franchise agreements permit buy backs at book value or depreciated value. Book value usually encompasses the value of the physical assets and does not include intangibles such as the value of good will, or the value of the franchise. The rationale behind depreciated value is that the cable operator has already received the value of the property through tax depreciation. In many cases, if book value were to include the cost of good will and the franchise agreement, the cost of the system would be too exorbitant for a city to buy. Furthermore, it is uncertain what fair market would encompass since a definition of fair market value is not included in the bill.

In actuality, few cities do buy back cable systems. Most buy back provisions are included in a contract as a way to ensure that the cable operator will fulfill its contract commitment.

This section also restricts the provisions of a franchise by further limiting what can be negotiated. It prohibits a franchise agreement from providing for less than fair market value when acquiring a system. Presumably, if a franchise agreement did provide for acquiring a system at less than fair market value, then referring to Section 603(2) which makes regulations that are inconsistent with the bill's provisions "null and void," then the agreement would be void, but the franchise would be intact.

Section 605(c). Programming

The second sentence of Section 605(c) prohibits any locality from owning or controlling "directly or indirectly" any of the programming of a cable system.

It states:

"In any case in which any such State, subdivision, or agency has or acquires any such ownership or interest in accordance with this subsection, such State, subdivision, or agency shall, in no case, own or control, directly or indirectly, any of the programming on such cable system * * *.

Such a provision rectifies any First Amendment argument against municipal ownership. However, the words "directly or indirectly" are not defined. It is, therefore, uncertain whether an independent corporation set up by the city or a contract with another entity to program the system would satisfy this requirement.

Section 607. Rate regulation

Under Section 607(b), "Each State or political subdivision or agency thereof, or cable franchising authority, is authorized to establish, fix, or otherwise restrict the rates, on a nondiscriminatory basis, charged for basic services." However, under the definitions in Section 604, basic service is what a cable operator determines it to be.

Ordinarily, basic services are negotiated by the parties. If the cable operator determines what is included as a basic service, there will be very little rate regulation by the locality, or franchising authority. In effect, this section, together with Section 604, limits the cities' ability to regulate. The fact that a basic service would be determined by a cable operator, instead of through negotiation, is certainly detrimental for the localities.

Section 611. Franchise fees

The Commission is authorized to establish reasonable ceilings for franchise fees paid to states or political subdivisions by cable operators. There is no definition of reasonableness nor any guide as to how to determine reasonableness.

CONCLUSION

In closing, APPA appreciates having this opportunity to testify. We reiterate our support for municipal ownership of cable, local rate regulation and franchising, and local regulation of pole attachment fee agreements. There are significant tie-ins between public power systems and public cable systems, and many of our members are exploring the feasibility of establishing public cable systems. The basic philosophy of low rates, efficient service, and citizen participation is common to both.

Mr. COURSEN. Thank you, Mr. Kiburz.

I have a few questions that Senator Goldwater has left, so we might as well proceed with them.

Mr. Gilliland, if the FCC were prohibited from imposing a limitation on franchise fees, do you think a city would increase its franchise fee? And if so, by how much?

Another part of the question——

Mr. GILLILAND. I am sorry. Did you say "if it lifted?"

Mr. COURSEN. If it would increase the franchise fee, how much do you think it would increase it? And second, since cable must pay a franchise fee, should other program providers have to pay to the city some kind of entertainment tax?

Mr. GILLILAND. Let me answer the second question first. The answer is: I do not think anybody should pay the fee to the cities. That is the answer to that question.

How much would they raise the fees if they could? I think they would raise them just as high as they possibly could. It would be different in different situations, depending upon the amount of leverage that a city had and the content of its franchise. But I do not think there is any question about the fact that the city would extract as much as it possibly could.

Mr. **Coursen**. Thank you. I did not neglect Mr. Brannies. He is now going to testify and then all the witnesses will comment on what Mr. Gilliland said.

Good morning, Mr. Brannies.

Mr. **Brannies**. Good morning, Mr. Chairman. I am Ken Brannies, manager of the Guadalupe Valley Telephone Cooperative, New Braunfels, Tex. I am also here to represent the National Telephone Cooperative Association, NCTA. I appreciate the opportunity to appear before you to comment on S. 2172, the Cable Telecommunications Act of 1982. I will summarize my comments and request that my detailed statement be included in the record.

NTCA is a national nonprofit association representing about 420 small rural telephone cooperatives and locally owned and operated commercial telephone companies in over 40 States. Development of these systems has been financed largely by loan programs administered by the Rural Electrification Administration.

This is not a giveaway loan program, but one that has been paying back its debts to the Federal Government for a long time, a program that has brought the breadbasket of America to the table of the world. Guadalupe Valley Telephone Cooperative is an REA borrower and serves over 8,000 subscriber-owners in central Texas. In 1981 Guadalupe Telco applied to the FCC for a waiver of its cross-ownership rule to offer cable television service within the Guadalupe service area. We are able to offer CATV to a sparsely populated area due to the economics that arise through the joint use of equipment, personnel, management, and real estate in both construction and operation of the cable television service area.

Our cable television service area has a density of 23 subscribers per mile of coaxial cable. Guadalupe Telephone was fortunate that its waiver was not opposed and was received within a few months. A separate subsidiary was formed, and Guadalupe Valley Cablevision, Inc., GVCV, commenced offering cable television in late 1981.

Telephone companies have a long history of service orientation. Provision of high quality technical service and repair is deeply rooted. We are continuing the same tradition in our cable television service. We are pleased to have the opportunity to provide more communication facilities to our subscribers and enjoy the responsibility and service opportunities of CATV that allows us to provide news, weather, community programing, cultural events to rural America. Parts of our franchise agreement require that GVCV provide an access channel for available community programing.

Turning to the specifics of S. 2172, as an operator of a rural cable television system, I am troubled by the codification of the FCC Telco-CATV cross-ownership ban. The ban has been subject to intensive FCC study, and protracted struggles over the establishment of standards for exempting rural Telco's from the rule. The FCC is currently examining the possibility of eliminating the cross-ownership ban entirely.

Meanwhile, although the Commission has acted to exempt rural areas from the ban, it has adopted an extremely restrictive definition of qualifying a rural area. Rural areas not meeting the FCC's definition of 2,500 persons and outside of an urbanized area or those in which a telephone company hopes to acquire an existing CATV system are still subject to lengthy delays in obtaining CATV service while the FCC processes Telco waiver operations.

In sum, Mr. Chairman, NTCA questions the need to codify the cable television-Telco cross-ownership ban. The original reasons for the 1970 prohibition no longer seem relevant. Since the ban is under review at the FCC, it seems more sensible for Congress to await that decision. Furthermore, Federal preemption of local franchising powers should be allowed only when absolutely necessary. Instead, we would like to see the Congress clearly state that its intent is to permit the rapid development of cable television for the greatest number of rural Americans. Local officials should have the opportunity to choose between competitors for franchises unhampered by unnecessary Federal regulations.

It is important to recall that telephone companies have won most contested cases for franchises because they will provide CATV to larger areas of service, the core population center, and a large portion of the surrounding less dense counties than most cable television operators.

Again, rural telephone companies are accustomed to rate regulation. They will provide service on lower profit margins and thus will service larger numbers of rural America. I believe that the determining factor in franchise bids should be who will provide high quality service to the largest numbers. Telephone company operators have earned their spurs as locally franchised utilities. They are heavily regulated by State public service commissions who scrutinize their costs before allowing tariff rates. Rural telephone companies are also used to paying utility taxes for the use of rights-of-way and do not oppose paying a reasonable franchise fee for similar rights to provide CATV.

S. 2172 attempts to solve the rural problem by establishing a rural exemption from the cross-ownership bans which must be promulgated by the Commission within 180 days. If the subcommittee decides to retain the ban, I am concerned that the proposed language of the exemption will not accomplish its intended purpose. The bill states at section 605(e)(1) "telecommunications carriers serving rural areas with low population density, as defined by the Commission, may provide cable services in such areas."

In light of the protracted effort at the Commission to use density to determine the threshold of CATV economic viability, and the abandonment of this effort in favor of a definitional approach, how will the words "rural areas with low population density," be interpreted? They could be interpreted to mean sparse areas below even the current overly restrictive FCC definition of under 2,500 people, in a nonurban area.

Thus, any rule exemption should be phrased as broadly as possible. However, millions of rural Americans live in population clusters of over 2,500 people, and the prospects of their imminent reception of CATV are clouded by the current FCC regulatory process. Applicants would have to file waivers of the rule, and the applications could easily logjam amidst cable operators' oppositions and slow processing due to a shrinking staff of Commission personnel.

In conclusion, NTCA urges that Congress should encourage a policy of rapid development of CATV in rural America. For over a decade rural telephone companies have been made ready to provide service but have been entangled in the Commission's regulatory morass. Meanwhile, a few cable television operators have found it economically attractive to provide service to rural Americans.

We ask this committee to trim unnecessary regulation of rural telephone companies and encourage our development of CATV in rural America.

On April 15, 1982, our rural co-op held its 27th annual meeting. Over 700 people attended, of which 402 were members. During this entire meeting no complaints of any kind were heard from the audience, not a peep. This is typical of our satisfied rural member-owners of the rural telephone service. The only question asked from our audience that evening, as the minutes will reflect, is a question asked by a lady, and I quote, "When are we going to get cable television?"

Mr. Chairman, please, in your deliberations, do not forget rural Americans. We did not get telephone service until 1955. Please do not let the regulatory process and the law make us wait until 1994 for cable TV. If you are looking for an excuse for deregulation, we are it.

Thank you for allowing us to testify.

[The following information was subsequently received for the record:]

GUADALUPE VALLEY TELEPHONE COOPERATIVE INC.,
New Braunfels, Tex., May 27, 1982.

Mr. CHRISTOPHER COURSEN,
Assistant Communications Council, Subcommittee on Communications, Russell Senate Office Building, Washington, D.C.

DEAR MR. COURSEN: I am pleased to take the opportunity to respond to Senator Pressler's questions for the record on S. 2172. I appreciate the interest of the Senator and other members of the subcommittee in insuring that rural Americans receive fair consideration in the ongoing debate over the proper legal and regulatory framework for the cable television industry. My responses to Senator Pressler's questions follow.

Question 1. I am concerned about the signal piracy section in this bill. I've heard from a number of people in my state who rely on earth stations. Most of these people are farmers and ranchers who will never have access to cable service. I understand that earth station users have tried in the past to negotiate with programmers on a fair and equitable basis. What do you know about this situation and what comments do you have on the signal piracy provisions?

Answer. Under Section II of S. 2172, persons who use earth stations to pick up satellite signals, but are unable to arrange to pay for the signals on an individual basis, would be liable for penalties for signal piracy. As a representative of the National Telephone Cooperative Association (N.T.C.A.), I share the Senator's concern that innocent citizens may be caught up in the copyright question. I am aware of several areas which are served by members of N.T.C.A. in western states such as Montana, and North and South Dakota where earth stations are being sold to people who live in remote places that are beyond the feasible areas of cable television investment. Major CATV suppliers such as Home Box Office, ESPN, and Showtime have refused to negotiate copyright royalty fees with them for the performance of their satellite-delivered signals. Thus, while these rural citizens are unlikely ever to be offered cable television service, under Section II, they could be criminally liable for signal piracy. I urge the subcommittee to consider modifying Section II in order to take care of such earth station owners and their suppliers.

Question 2. Could you explain why there has been so little cable service developing in rural areas?

Answer. CATV development has been slow in rural areas. It is economically unattractive to cable television operators who seek a high rate of return to build a system in sparsely-settled areas. Studies indicate that densities of over 40 subscribers per route-mile are generally necessary for economic feasibility. However, telephone systems who provide CATV service are willing to receive lower rates of return and have some economies of joint operation which allow them to serve lower subscriber densities.

Question 3. How can rural telcos offer cable in rural areas where other cable television operators find it impossible?

Answer. As stated in the answer to the second question, rural telephone systems have some advantages over commercial cable operators which lessen their threshold of feasibility. First, there is an economy of joint management and operation. Most telco's have technically skilled employees who can be quickly trained to provide CATV services. Second, rural telephone systems have a history of providing communication services at regulated levels of return on investment which are lower. Often their state public service commission sets rates of eight to twelve percent. On toll revenues the FCC often sets figures of ten to thirteen percent for AT&T, which becomes the basis for their division of toll revenuse with independent telcos.

Question 4. Could you please comment on two issues addressed in S. 2172—the franchise fee ceiling and the controversy over local versus federal regulation of cable.

Answer. Rural telephone systems as regulated utilities are accustomed to paying a franchise fee for the privilege of using local and state rights-of-way. These fees range from six to ten percent of gross revenues. They are also accustomed to a relatively high level of regulation at the state level.

With respect to the controversy over local versus federal regulation, I believe the deregulation at the federal level is a sound policy for CATV. The franchise process involves local rights-of-way and community interests for governmental and educational needs. Since local officals have a better grasp of the needs of their constituents than do federal regulators, I believe that federal regulations should be avoided wherever possible.

Question 5. All of us in Congress are concerned about the proposed changes in the telephone industry and the effect on local rates. Could you comment on the possibility of cable competition for business phone users, and its impact on local rates.

Answer. Many participants in the current debate over telecommunications legislation now realize that deregulation in competition are raising local telephone costs. Much concern has been expressed about the problem of bypassing the local telephone loop. In a growing number of instances, CATV systems are providing such non-entertainment communications services as enter-bank information networks and data transmission services. However, providing this type of service is generally economically attractive to a cable system only if the customers served are the lucrative business subcribers. This type of cream-skimming of toll revenues will inevitably increase local telephone rates.

Fortunately there is a growing awareness of this problem in Congress. Many have expressed the sentiments that the economic integrity of the local loop must be protected and that competitors for toll revenues should help to support the national public telephone network. As an operator of a small telephone system I strongly support this concept. I also believe that the increase of CATV competition for telephone business should moot the need for telco-CATV cross-ownership bans. I strongly believe that communications services should be allowed to compete for business with the same ground rule.

Question 6. What are the three most important things Congress can do to insure that the benefits of cable television and other new technologies are available not to just urban areas, but also to smaller, rural communities?

Answer. Clearly, the most important action Congress can take to insure that rural areas share the benefits of cable television and other new technologies is to remove the restrictions on telephone companies providing these services. Rural telephone systems want to provide CATV and other communications services to their subscribers. While much of the focus of the debate on CATV is on entertainment television, many far-sighted rural telcos view broad ban technology as a significant part of the public interactive communications network of the future. With this view, it is clear that encouraging CATV development over the widest area is in the public interest. However, as discussed above, currently, most commercial cable operators show little interest in adopting the area coverage approach since they rarely serve rural counties around a core population center. In contrast, the approach of service to the greatest numbers is central to most telco-CATV proposals. That is why local franchise authorities prefer to grab the applications of telcos over competing CATV companies. Removing impediments to telco-CATV cross-ownership will further this important public policy.

This view of cable as a component of the public interactive communications network raises another major policy issue. In order to remain maximum freedom of speech over the interactive network, it may be important to classify CATV as a common carrier. As long as those who control the interactive facilities also exert control over the information transmitted, freedom of speech—the diversity of the marketplace of ideas—cannot be assured. As a further consideration less than half of the CATV systems originate their own programming and most of all CATV programming is supplied by independent sources anyway. Current legislative proposals do not, in fact, classify CATV operators as common carriers. However, I believe that this policy deserves serious consideration by the Congress.

Another important action the Congress can take to insure that new technological developments in communications reach rural areas is to recognize the special needs of such areas. Competition to provide service is unlikely to develop at the local level in sparsely settled areas. In many places, it is difficult enough for telephone companies to survive. Pro-competition policy, a boon for urban areas rich in businesses, do not always make sense in rural areas.

This problem should be recognized in formulating communications policy. Issues such as by-pass of the local telephone loop and a rural telco-CATV cross-ownership ban, to name only two, should be approached with the understanding that the economics of the capital-intensive communications industry probably do not allow competition in rural areas. Rural telcos should be encouraged to provide new services to communications-poor rural Americans. The impact of cream-skimming competition should be carefully monitored in rural areas because these competitors will never provide universal service to most rural residents. Otherwise, many rural Americans will never have an opportunity to participate in the Information Age.

Finally, as mentioned in my testimony before the subcommittee, the Farmers Home Administration and the Rural Electrification Administration cooperatively operated for three years a small program to provide federal financing for rural CATV. The program was not funded in FY 1982 and no funds have been proposed for FY 1983. During its brief operation the program brought cable television to 116,000 rural Americans by granting loans to telcos and cable television companies. I strongly urge the members of the subcommittee and their colleagues in the Congress to consider reinstating funds for development of new communications technology in rural areas.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

KEN D. BRANNIES,
General Manager.

Mr. COURSEN. Thank you.

Now, let me just repeat the question I posed Mr. Gilliland. If the FCC were prohibited from imposing a franchise limitation on franchise fees, would a city increas that fee? If so, by how much?

Second, since cable must pay a franchise fee, should other program providers have to pay to the city some kind of an entertainment tax?

Would any of the other gentlemen like to comment?

Mr. GILLILAND. I would like to elaborate a little bit on my answer. I think the cable television industry should pay a reasonable fee, but that should be the end of it. I do not think any of the other communications media should pay a fee to the State.

Mr. JORDAN. Chris, I have not considered the second part of your question. I think all of us in Raleigh, including myself—and I am a businessman. I have to earn a living—we want the cable company to earn a reasonable profit. We don't want to unnecessarily take money away from them and prevent them from doing that. But I can see where there may be some circumstance in some other cities where the fee may need to be more than 5 percent. I don't know. I believe in Raleigh that we can govern the franchising process of the cable television network with 5 percent, but I would not want to keep another city from getting more if they felt it was necessary.

Mr. COURSEN. Any other panelists?

Mr. Jordan, should franchise authorities have complete discretion when choosing a cable company to serve their community?

Mr. JORDAN. By that do you mean the cities that are choosing them? Absolutely. The city is the lowest part of the governing process. My telephone number is in the directory in the city of Raleigh. I can be called and am called every hour of the day. So I think we probably know as close as anyone what the public needs and how to best get it.

Mr. COURSEN. Mr. Blanchard, do you see any need for local regulation of pay services on cable?

Mr. BLANCHARD. No, Chris, I do not. I believe that the marketplace will take care of the problem. This idea of attempting to regulate rates just looks counterproductive to me. The fact that we are only able to obtain 50-percent penetration amongst our subscribers indicates clearly that they have the option of what they want to do, and I am convinced that whether they subscribe to the service, depends upon the personal priorities and financial resources. The areas we serve are retirement communities, people here have limited and fixed incomes. They are very money conscious. The rates that we charge our customers, has a great influence upon what kind of subscriber penetration we get. They are very, very picky about how much they are going to have to pay each month. The montly cost is the primary condition that determines whether they are going to get on that cable system or not.

So it would be silly for us to try to price ourself out of the market. We must keep the costs down if we want to keep the subscribers on the system. I think the operator is the only one who is able to adequately perform that balance.

Mr. COURSEN. Section 603 permits States to regulate anything that is not exclusively assigned to the FCC and not forbidden in the bill.

Would you favor a more specific grant of authority to the States?

Mr. KIBURZ. I think it should be just as broad as possible what they grant to the States so that the Federal regulation is kept to a very minimum.

Mr. GILLILAND. I would like to comment on the rate question you asked earlier, Chris. The hue and cry of cities is that we need rate regulations in order to get franchise compliance. I think those are two entirely separate issues. I have no defense for a cable operator who does not comply with a franchise or comply with the promises that he made. I think that the cities should and probably do in all cases have some other compliance mechanism. Rates are a separate issue. Rates should not be used as a compliance tool. It is counterproductive.

Mr. JORDAN. You know, Chris, you have to use whatever lever you have in the political process to achieve your goal. If that be rates or franchise fees, then so be it. I believe in accomplishing the very best I can for the citizens of Raleigh. But you know, when you talk about great risk that someone makes, probably return on investment in the cable industry is approaching 20 percent. The interests we are talking about is the interests of people in all the communities in America, and I think all of us on the local governing bodies want to serve that interest.

Finally, for all practical purposes, cable companies have a de facto monopoly. They have no competition. In my business I assure you I have competition.

Senator **Goldwater**. Mr. Brannies, should A.T. & T. be allowed to own cable systems?

Mr. **Brannies**. I didn't know I was going to speak for A.T. & T. today. I am for competition everywhere you can find it, Senator.

Senator **Goldwater**. You do not care?

Mr. **Brannies**. I could care less.

Senator **Goldwater**. I do not think they are going to, but I was just bringing up the point.

Mr. Gilliland, S. 2172 provides that the FCC must require cable systems with 20 or more channels to set aside 10 percent of their capacity for public, educational, and governmental programers, and an additional 10 percent for lease programing.

Do you agree that cable systems should make such access opportunities available?

Mr. **Gilliland**. I agree that they have made them available, and there has been to my knowledge no demonstrated testimony before you that anyone has been denied access to cable television systems. I think this is the 1972 FCC rule all over again in terms of applying regulation that we have no demonstrated need for, and the setting aside of 10 percent of the channels when there is no demonstrated need I think is a real waste of the spectrum space. I do not know of anyplace where the issue of we could not get on the cable system has been demonstrated. I just do not see a demonstrated need.

If we go on in the future and you have evidence and people come to you and testify that I could not get on the cable system and I had public access programing and wanted to do that, then I think there may be a need for it. But I do not think there is a need for it.

Senator **Goldwater**. Do any of you other gentlemen have any comments on that?

Mr. **Jordan**. Senator Goldwater, this gentleman may very well be right, but it is like a lot of other things that we develop in this country. Until people become aware of them and have direct knowledge of them, they do not know that they want to use them.

The thing I realize in Raleigh, we have been locked into a 15-year franchise. Those things were not required 15 years ago. If we do not require them today, we are going to wake up in America and the public will not have access to the medium called television. I think we have to set aside that right for the public to use, that if we do not do it, then they will never have that privilege of using television.

Mr. **Gilliland**. I could make a comment about that. We have had a public access channel in San Jose since 1972. We publish a monthly guide which goes to all of our subscribers outlining all the programing. There is one full page devoted to our access channel. It invites you to come in and use the facilities. We have a four-man staff whose mandate from me personally is to encourage as many people to use public access as possible. That is your job. You go out and get people in to use the public access channels, and after 10 years of this and a four-man staff and a studio, that access channel is not used more than 4 or 5 hours a day.

Now, there is no demonstrated need for nonaccess. It's there. Please use it. We want you to. We advertise it. I can bring operators in here by the hundreds who have had exactly the same experience. There is no demonstrated need.

Mr. **JORDAN**. Senator, do you remember when you did not have electric lights? I am not quite that old, but my grandfather was. A lot of people did not have them. I remember my grandfather grew up in rural North Carolina and was a long time getting electric lights. But my point is about electric lights, we do not call them electric lights today. Look at all the things that electricity has brought to us. As people, consumers in America, did we dream of that 50 years ago?

We are on the real threshold in cable television. We have got to be forthright, far-reaching thinkers. I can remember in my short life that most people, or a lot of people in Raleigh did not have telephones, but today almost everybody has a telephone.

Senator **GOLDWATER**. That is too bad.

Mr. **JORDAN**. If you are holding elective office, sometimes it is too bad. But the point is, Senator, that down the road I think almost every American will have cablevision. Let us do a good job of it.

Senator **GOLDWATER**. Mr. Blanchard, do you have anything to say?

Mr. **BLANCHARD**. I have already said I do not think public access is a requirement, or that it should be the role of the government to mandate it. I think the local operator will provide public access if the need is there.

I think everybody in the cable field feels the same way. If the need is there, we are more than happy to provide it. You do not need to set channels aside for this service. Let the public and the operator decide when it is needed.

Senator **GOLDWATER**. In television either the refusal or the oversight of this can cause a license to be taken away. In my experience, I frankly see no need for it—not "no need," but I do not know of a manager of a station that would not say, fine, let's hear your problem.

Thank you, gentlemen.

Senator **GOLDWATER**. Our next panel will be Ms. Peggy Charren, president of Action for Children's Television; Mr. Bruce Jacobs, National Citizens Committee for Broadcasting; Ms. Sue Buske, executive director of National Federation of Local Cable Programmers; and Mr. Richard L. Brown, vice president and general counsel of the Society for Private and Commercial Earth Stations.

You have all been in here, and you have heard about putting your remarks in the record and making them brief, and then we will have questions.

So, Ms. Charren, you are first.

STATEMENTS OF PEGGY CHARREN, PRESIDENT, ACTION FOR CHILDREN'S TELEVISION; BRUCE JACOBS, DIRECTOR, COOPERATIVE COMMUNICATIONS PROJECT, REPRESENTING SAMUEL A. SIMON, EXECUTIVE DIRECTOR, NATIONAL CITIZENS COMMITTEE FOR BROADCASTING; SUE BUSKE, EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF LOCAL CABLE PROGRAMMERS; AND RICHARD BROWN, VICE PRESIDENT AND GENERAL COUNSEL, SOCIETY FOR PRIVATE AND COMMERCIAL EARTH STATIONS

Ms. CHARREN. I am Peggy Charren, president of Action for Children's Television, a national child advocacy organization that has worked 14 years to improve children's experiences with television. ACT believes that this goal can best be accomplished through an increase in programing choices for children.

We therefore support a number of strategies that promote television diversity, such as regular scheduling of children's programs on weekdays as well as weekends and increased funding of public broadcasting. In addition, ACT encourages the development and expansion of new technologies such as cable television that can dramatically increase program choices.

ACT supports the majority of the provisions in S. 2172 and welcomes this opportunity to comment. I would like to begin with two issues that are not addressed by the bill and that ACT considers vital to the development of a national cable television policy serving the needs of children.

The first is the availability of so-called adult programing on cable. ACT believes that the Government cannot and should not intervene to censor television portrayals of sex, violence, or other adult materials.

However, ACT argues that the increased availability of adult material on cable television makes it extremely important that parents be given the opportunity to supervise and, if necessary, control their children's viewing. We believe that lockout devices that allow people to block out channels carrying adult programing are a necessity.

We therefore recommend that this bill require all cable operators to provide lockout devices free of charge to those subscribers who request it.

We further recommend that the bill should explicitly prohibit censorship of cable programing by any Government agency or indeed by cable operators.

The second issue involves cable advertising. Advertiser-supported messages on cable can be short, or even full-length, programs, difficult to distinguish from regular programing. Many viewers will have a hard time determining whether cable is delivering information or infomercials.

We recommend that all paid commercial content be identified as such. We further recommend that all infomercials and program-length commercials targeted to children display a visual disclosure of their commercial nature for the entire time they are on the television screen.

Because they encourage diversity of access and control, ACT supports the sections of the bill that require the cable systems to set aside channels for public and for leased access; that guarantee access on a first-come/first-served, nondiscriminatory basis; and that require the FCC to insure equal employment opportunity by cable operators.

ACT opposes the section totally exempting cable from compliance with the fairness doctrine and equal time requirements of the Federal Communications Act. Controversy and debate guarantee a more informed citizenry, which in turn guarantees a healthier democracy. ACT therefore recommends that cable operators be required to provide affirmative access for presenting opposing viewpoints of public importance.

We oppose the section permitting the FCC to eliminate cable company's obligations to provide leased access channels. We believe this provision threatens premature elimination of leased access.

We oppose the section authorizing the FCC to establish conditions of carriage of TV broadcast signals. We recommend that the bill require cable operators to carry broadcast signals in order to increase program diversity and diversity of control.

In addition, ACT recommends that some or all of the public access channel capacity be made available to programers free of charge to guarantee that rich and poor alike have an equal chance to express their points of view. I would like to add here that a well-managed institutional loop, such as Ralph Lee Smith talked about this morning, can have important benefits for children, too.

Finally, ACT recommends that a portion of cable operator records, such as program logs and letters from the public, could be made available for public review.

Let me close by urging you to keep in mind the special needs and vulnerabilities of the child audience as you consider this legislation and to remember that today's children are tomorrow's voters.

Every child in the United States will, on average, watch 20,000 hours of television before casting his or her first vote as a citizen. It is crucial that the information base each of these new citizens brings to the voting booth reflects all the diversity and potential of humankind.

On behalf of Action for Children's Television, thank you for your attention.

[The statement follows:]

STATEMENT OF PEGGY CHARREN, PRESIDENT, ACTION FOR CHILDREN'S TELEVISION

Good morning. I am Peggy Charren, President of Action for Children's Television. ACT is a national child advocacy organization that has worked for fourteen years to improve children's experiences with television. ACT believes that this goal can best be accomplished through an increase in programming choice for children. We therefore support a number of strategies that promote television diversity, such as the regular scheduling of children's programs on weekdays as well as weekends and increased funding of public broadcasting. In addition, ACT encourages the development and expansion of new technologies such as cable television that can dramatically increase program choices.

Cable has the potential to serve the needs of the child audience for a number of reasons. Chief among these are its multi-channel capacity, its subscription-based support, and its many in-school uses. Cable's public access channels also give young people the opportunity to produce their own programming. Many of ACT's suggestions for how cable can best serve young audiences are summarized in our new publication, "Cable and Children: An ACT Handbook,"[1] which was submitted to you with our testimony.

SENATE BILL 2172

Because of the significant impact cable can have on children, we share your interest and concern about the future developments of cable television and welcome an opportunity to comment on Senate Bill 2172. ACT believes in the vital importance of a local cable system that is responsive to the needs of the community it serves and that provides as great a diversity of programming as possible. With the needs of the public, particularly young people, in mind, ACT supports the majority of the provisions in the bill but would like to recommend several changes. Before I list these proposed changes, I will comment on two issues that are not addressed by the bill and that ACT considers vital to the development of a national cable television policy serving the needs of children. The first of these issues is the availability of so-called adult programming on cable, and the second involves the advent of program-length cable commercials.

1. *Adult programming:* ACT believes that the government cannot and should not intervene to censor cable television portrayals of sex, violence, or other "adult" material. Such government action would violate the free speech rights of cablecasters as well as the rights of adult audiences to view what they please. However, ACT argues that the increased availability of adult material on cable television makes it extremely important that parents be given the opportunity to supervise and, if necessary, control their children's viewing. Detailed program guides are only a partial solution; we believe that lock-out devices, which allow parents to block out channels carrying adult programming, are a necessity. We therefore recommend that S. 2172 require all cable operators to provide lock-out devices free of charge to those subscribers who request them. We further recommend that the bill should explicitly prohibit censorship of cable programming by any government agency.

2. *Cable advertising:* Many of us would like to think that subscriber fees will make commercials on cable television unnecessary. But it is already obvious that cable is seen by advertisers as a cost effective way to target commercials to very specific audiences. The danger of cable advertising lies in the fact that commercials as we know them today—30 and 60 second messages from a clearly identified sponsor—will change. Advertiser-supported messages on cable can take the guise of short, or even full-length, programs that will be difficult to distinguish from "regular" programming. Adult viewers will have a hard time determining whether cable is delivering information or "infomercials." For child viewers, this confusion over commercial content will be absolute. ACT believes that all cable advertising must be clearly identified to minimize this kind of deception. We therefore recommend that S. 2172 should require every commercial or advertisement, infomercial, and program-length commercial on cable to be clearly identified as a commercial message, with unequivocal sponsor identification. We further recommend that all infomercials and program-length commercials targeted to children should display a visual disclosure of their commercial nature for the entire time they are on the television screen.

I would now like to comment on those portions of the bill that ACT supports, opposes, and wishes to amend.

Because they encourage program diversity and public service, ACT supports the following sections of the bill:

1. The sections providing for a national cable television policy ensuring that cable will be "responsive to and serve the needs and interests of the public" [s. 601(3) and (4)];

2. The sections requiring that cable systems with 20 or more channels should set aside 10 percent of these channels for public, educational, and governmental use and another 10 percent for use by leased channel programmers [s. 606(a)(1) and (2)];

3. The section stating that public and leased access channels should be made available on a first-come, first-served, nondiscriminatory basis [s. 606(c)]. These three provisions are vital, because they guarantee that no cable operator will have exclusive control over all the televised information in a single community, nor will be able to censor every channel.

4. The section requiring the FCC to ensure and promote equal employment opportunity by cable operators [s. 615]. ACT believes that the presence of more minorities and women in decision-making positions in the cable industry will create a greater diversity of cable programming.

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[1] The handbook has been retained in the committee files.

Action for Children's Television *opposes* the following sections of the bill:

1. The section totally exempting cable from compliance with the Fairness Doctrine and the equal time and reasonable access requirements of the Federal Communications Act [s. 610]. While ACT recognizes that cable's multi-channel capacity may ultimately allow for different viewpoints to be expressed in its programming, we do not believe that the availability of diverse programming can be left up to chance. Cable television, like broadcasting, has a responsibility to offer its public both sides of controversial issues. Controversy and debate guarantee a more informed citizenry, which in turn guarantees a healthier democracy. ACT therefore recommends that cable operators be required to provide affirmative access for presenting opposing viewpoints on issues of public importance.

2. The section permitting the FCC to eliminate cable companies' obligation to provide leased access channels if the Commission thinks there are "reasonably available alternatives" [s. 606(b)]. ACT believes that this provision threatens premature elimination of leased access.

3. The section authorizing the FCC to "establish the terms and conditions respecting the carriage of radio and television broadcast signals by cable system operators" [s. 609]. In order to guarantee program diversity, ACT recommends that the bill require cable operators to carry broadcast signals.

In the interest of greater program diversity and increased public service and in response to the needs of young audiences, ACT recommends that the following sections of the bill be changed:

1. The section permitting all access programming to be combined onto one or more channels and stating that access channels may be used for other purposes, "until such time as there is demand for each channel full time for its designated use" [s. 606(d)]. This section of the bill should make absolutely clear that, whenever access channels are used for other services, access programming will take priority over any other kind of programming and will be allotted regular time slots on the access channel or channels. In addition, in a conflict over time slots, public, educational, and governmental access programming should be given priority over leased access.

2. The section allowing each cable franchising authority to fix the rates charged for the use of channel time on public, educational, and governmental access channels [s. 607(a)]. ACT believes that it is not sufficient to ensure that these rates are established "on a nondiscriminatory basis." In order to guarantee that all members of the public, rich and poor, have an equal chance to express their points of view, we recommend that some or all of this access channel capacity be made available to programmers free of charge. We recognize that the bill does not prohibit free public access but neither does it require it. ACT argues that at least some free access to channel time must be written into the law.

3. The section permitting the cable franchise authority to establish the rates charged to cable subscribers for basic cable services [s. 607(b)]. We recommend that this section of the bill be amended to ensure that these basic rates will be low. While it is not reasonable for Congress to set a single charge for basic services across the country, it is vitally important for Congress to mandate that basic cable services "shall be available inexpensively." Without this amendment to s. 607(b), there is nothing to prevent the local franchising authority from making cable television a luxury that only the rich can afford.

4. The section requiring cable operators to maintain records and submit reports to the FCC [s. 614]. ACT recommends that portions of these records, such as programming logs and letters from the public, such as programming logs and letters from the public, should be available for public review. We are not suggesting that the public should have access to personally identifiable information regarding subscribers but only to information that will aid the public in their assessment of a cable operator's performance.

Let me close by urging you to keep in mind the special needs and vulnerabilities of the child audience as you consider this legislation.

On behalf of Action for Children's Television, thank you for your attention.

Senator Goldwater. Thank you.

Mr. Bruce Jacobs will be next.

Mr. Jacobs. Thank you for this opportunity to appear here today to discuss our views on Federal cable legislation. Initially, we want to commend you on the introduction of S. 2172. The bill represents a refreshing recognition of the important role of Government in fostering the full potential of cable television development in the United States.

We at NCCB are convinced that cable television, with its broadband and interactive capabilities, offers for the near future the greatest hope for expanding choice for telecommunications users and consumers.

We cannot rest satisfied, however, just because the technology of cable is an improvement over previous technologies. Because cable is essentially a monopoly service and because of significant externalities—such as the role that cable can play in economic development and energy efficiency—it is crucial that Government policies be developed to protect and promote the public interest.

More specifically, in the framework of S. 2172, let me spotlight some of our major concerns.

The first fall in the area of ownership. NCCB has been particularly involved with the issue of cable ownership. Our cooperative communications project promotes and provides assistance to consumer cooperative development in the communications field. We would oppose any legislation that would interfere with a community making the decision that it preferred public ownership, whether cooperative ownership or municipal.

In this regard, we are concerned about section 605(a). If read expansively, this provision might preclude a franchising authority from granting a preference to an applicant such as a consumer cooperative on the basis of that applicant, providing for broad-based local ownership.

In addition, we would like to express our concern with provisions of section 605 that would codify existing FCC restrictions on cable system ownership by telephone cooperatives. We strongly believe that telephone cooperatives should be exempted from these restrictions. The fact is that telephone co-ops, as the gentleman testified on the earlier panel, would provide service to more people and give them greater control over the quality and cost of that service. Rather than restricting telephone co-ops, Congress should be encouraging their expansion into the cable field.

The second area of concern involves the guarantee of reasonable access to diverse program and service providers. Our concern here is that section 606 can be read to supersede greater access obligations than those which franchising authorities and cable companies have agreed to in the past or may agree to in the future.

We are also concerned about the absence of an adequate definition of the type of programing that would satisfy the requirements for dedicated access channels. We would like to see a definition developed that encourages the use of these channels for local program origination by groups other than the cable operator. In addition, we would like to see the definition expanded to include service providers as well as programers. For example, an electric utility that wanted to use the cable system for load management should be able to gain access to that system.

As a separate matter, it is also important to assure that cable operators not be permitted to control the content of access programing. Access users should be assured that there will be no censorship of their programing by the cable operator.

The third area of concern involves the preservation of effective rate regulation. Regarding this, we strongly believe that there must be some effective way of assuring that lease channel users are charged reasonable rates. Of all potential customers of a monopoly cable operator, those who would lease channels from the operator to provide potentially competitive services are most vulnerable to unreasonable tariffs.

The fourth area of concern involves the creation of greater privacy safeguards. We support the provisions of S. 2172 that are designed to protect subscriber privacy. We would recommend a few further safeguards that are described in our written testimony.

Finally, although not at all the least of our concerns, is the provision of S. 2172 that would eliminate the application to cable operators of the Fairness Doctrine, Equal Time, and Reasonable Access Rules. We strongly oppose such a blanket prohibition. So long as cable operators are permitted to program massive numbers of channels, sections 312(a)(7) and 315 of the Federal Communications Act should apply at least to some degree. If, on the other hand, there were effective requirements for uncensored access by local programers, this would go a long way toward reducing the need for concern about monopolization in the media. But until those access requirements are in place, it is premature to eliminate the abovementioned rules.

In addition, we urge the committee to consider including a provision in S. 2172 to encourage the development of alternative models for ownership of cable television systems. Consumer cooperative participation in the ownership and operation of cable systems should be part of our national cable policy. Cooperatives have proven their value in numerous sectors of our economy, including housing, insurance, credit, and energy. They have provided service to areas that otherwise would have gone unserved. They have improved the quality and cost of goods and services, and they are providing consumers with greater control over the business enterprises that are important to their daily lives.

Again, Mr. Chairman, we applaud the progress being made in beginning this national debate on the future of cable television in America. We appreciate the opportunity to be part of that process. Thank you.

[The statement follows:]

STATEMENT OF BRUCE JACOBS, DIRECTOR, COOPERATIVE COMMUNICATIONS PROJECT

Mr. Chairman, my name is Bruce Jacobs. I am Director of the Cooperative Communications Project of the National Citizens Committee for Broadcasting. I appreciate the opportunity to appear today to discuss S. 2172 and the views of NCCB on federal cable legislation.

The National Citizens Committee for Broadcasting is a national membership organization with over 8,000 individual members and more then 120 organization and group members from throughout the United States.

Our goal is to assure a diverse and democratic communications system in the United States. In pursuit of that objective, we participate in regulatory and legislative proceedings on behalf of our members, we publish Access journal and we engage in a variety of educational activities. Ralph Nader is the Chairperson of NCCB.

Initially, we want to comment Senator Goldwater on the introduction of S. 2172. The bill is an important beginning in the process of establishing a naitonal cable television policy. It represents a refreshing recognition of the important role of the government in fostering the full potential of cable television development in the

United States. It also provides a welcome contrast to the policies of Mark Fowler, who would have us abandon legitimate public interest regulation to a non-existent competitive marketplace.

We are convinced that cable television, with its broadband and interactive capabilities, offers the greatest hope for the near future of expanding user and consumer choice. We cannot rest satisfied, however, just because the technology of cable is an improvement over previous technologies. Because cable is essentially a monopoly service and because of significant externalitites—such as economic development potential and energy efficienty—associated with its operations, it is crucial that government policies be developed to protect and promote that public interest.

If we were to describe the ideal regulatory framework for cable television in the United States, it would be one that required operation of cable systems as common carriers. Common carriage would eliminate most of the problems and concerns that S. 2172 is forced to address, and which ultimately must be included in a national cable policy. Inherent in common carriage is the principle of universal service at reasonable rates with adequate capacity to meet programming access demands. It would assure that the cable operator would not have editorial control over the entire system, something which we believe to be extremely important.

S. 2172 does not propose the establishment of a common carrier cable policy, nor does it propose a separations policy that would strictly limit the number of channels over which the cable operator could maintain programming control. Nevertheless, there are aspects of S. 2172 that do begin to address our concern, especially the requirement for dedication of a minimum channel capacity for public, educational, and leased access.

In the framework established by S. 2172, NCCB believes that the following concerns need to be addressed in any federal cable legislation: freedom of local communities to choose the form of ownership of their local cable system; a guarantee of reasonable access to the system for diverse programming and service providers; preservation of the opportunity effective rate regulation; creation of greater privacy safeguards; fostering of technical compatibility within and among communications technologies; maintenance of the Fairness Doctrine and Equal Time requirements where there is no effective access by the public to the cable system.

NCCB has been particulary involved with the issue of cable ownership. Our Cooperative Communications Project, founded in late 1979, promotes and provides assistance to consumer cooperative development in the communications field. As director of the Project, I work personally with many people from throughout the United States who believe in cable as a technology that can bring greater diversity and local self-expression, but are convinced that cable will remain chiefly a purveyor of movies and sports unless there is a degree of local ownership and control. These community leaders have seen other monopolies that have been slow to innovate; they have seen cable companies in other cities that have made extravagant promises and failed to carry them out, or have maintained obsolete systems despite adequate returns to justify upgrading; and these leaders simply are convinced that they can do it better themselves.

While we focus our resources on encouraging the development of consumer cooperative, rather than municipal ownership of cable system, we recognize that there may be situations in which some form of municipal ownership is more practical or preferable. Consequently, we oppose any legislation that would interfere with a community making a decision that it preferred any kind of public ownership—whether cooperative or municipal. In this regard, we are concerned about several provisions of Section 605 of S. 2172. First, Section 605(a) does not allow a franchising authority to "prohibit, or otherwise regulate, the ownership of cable systems by any person" except as provided in later subsections. Read expansively, this provision could preclude a franchising authority from granting a preference to an applicant, such as a consumer cooperative, on the basis of the co-op's providing for broad-based local ownership. Read in connection with Section 605(c), it could also be taken to mean that a franchising authority could not grant a franchise to itself for one of its agencies, but is limited to buying a franchise for an operating cable company.

Another concern with Section 605 is its limitation in subsection (b)(2) that a city may not acquire a system by purchase unless the purchase price is at an undefined "fair market value." We would like to see fair market value defined to exclude the value of the franchise license in those cases where the franchising authority has determined that the operator has materially violated the franchise agreement. To define fair market value otherwise is to allow the delinquent cable operator to benefit from its noncompliance.

Similarly, the provision should be clarified to limit its applicability to those situations where the governmental unit is intentionally acquiring an ownership interest in all or part of the system and not just regulating the system in the traditional sense. Without such a limitation, a cable operator would certainly soon argue that every new regulation constituted a "taking" at less than fair market value of an interest in the cable system.

In addition, the franchising authority should be able to make the decision at the end of the franchise term to buy out the operator rather than awarding a new franchise. While as a logical matter it would seem clear that the fair market value of the system at the end of the franchise does not include any value for the expired franchise, by leaving the term "fair market value" undefined, operators will undoubtedly argue that there is some value in the expectation of a franchise renewal. We would prefer to see a clear definition of fair market value, limiting it to the systems physical assets and good will.

We would also like to express our concern with provisions of Section 605 that would codify existing Federal Communications Commission restrictions on cable system ownership by telephone cooperatives. We strongly believe that telephone cooperatives should be exempted from these restrictions. The FCC's traditional concerns with telephone entry into the cable market are inappropriate when the telephone company is owned cooperatively by its consumers. With the same consumers involved in both, there should be no concern that the telephone co-op will either hold back on innovation or will cross-subsidize. The fact is that telephone co-ops would provide service to more people and give them greater control over the quality and cost of that service. Rather than restricting telephone co-ops, Congress should be encouraging their expansion into the cable field.

Section 606, Dedication of Channel Capacity, also raises several concerns. Our chief concern is that the provision can be read to supercede greater access obligations than that which franchising authorities and cable companies have agreed to in the past or may agree to in the future. We have all watched the franchising process around the country over the past several years and it has clearly been a mixed bag. It does succeed, however, at giving cities a chance to establish their priorities regarding the type of cable system that will serve their community. We believe Section 606 should be clarified to assure that the dedicated channel requirement is a minimum, not a maximum, and that cities should be free to seek more during the franchising process.

We are also worried about the lack of definition for the type of programming that meets the requirements for dedicated channels. We would like to see a definition developed that encourages the use of the channels for local program origination by groups other than the cable operator. In addition, we would like the definition to include service providers as well as programers. For example, electric utilities that want to use the cable system for load management should be able to gain access to channel capacity.

The concept of combining underutilized access channels is reasonable, but rather than providing for shared use until demand for each channel is "full time," i.e. 24 hours a day, we would prefer to see the sharing provision triggered only when useage falls below something like 60 percent useage each day for one month.

Regarding rate regulation, we strongly believe that there must be some effective way of assuring that leased channel users are charged reasonable rates. Of all potential customers of the monopoly cable operator, those who would lease channels from the operator to provide potentially competitive services are most vulnerable to unreasonable tariffs. In the recent past, as channel leasing is more frequently discussed, cable operators have continually said that they are very reluctant to lease channels, fearing that they will be labelled as a common carrier and will lose potential profits from those services offered by lessees. As an alternative, in order to retain greater control and greater profits, cable operators are entering into joint ventures with would-be lessees or at most offering short-term leases of one or two years. While it may be too early to tell, we would anticipate that this sort of anticompetitive behavior will carry over into the rates that operators charge for channel leases.

In addition, the definition of basic service, the rates for which can be regulated, should be expanded to prevent cable operators from narrowly defining it as only broadcast signals. In most cable systems, the basic cable package includes cable-only, satellite-delivered programming.

We would recommend changes in Section 608 to the extent that, as currently written it might relieve a cable operator from liability for false or misleading advertising in those situations where, as is common in the cable industry, the operator receives a share of the revenues from the sale of the advertised product. In general, cable operators should be encouraged to screen advertising to eliminate false or misleading claims.

At the same time, it is important to assure that cable operators not be permitted to control the content of access programming. Access users should be assured that there will be no censorship of their programming by the cable operator. Cable operators, worried about hassles with the franchising authority, will have an incentive to censor any potentially controversial programming. While we would argue that the cable operator in such circumstances should be seen, for purposes of applying the First Amendment, as a state actor, we are unaware of any directly relevant case law on the subject and would prefer not to risk being wrong. Furthermore, we are convinced that any truly unlawful access programming, whether it is obscene, libelous, or whatever, can be dealt with adequately without setting up the cable operator as a censor.

We support the provisions of S. 2172 that are designed to protect subscriber privacy. We would recommend as further safeguards that: (1) the cable operator disclose to the franchising authority its security procedures, in order for the franchising authority to evaluate their adequacy; (2) the informed consent required of subscribers be periodically renewed; (3) subscribers have the right to be notified when adverse decisions are made on the basis of information derived from the cable system, and (4) subscribers have the right to inspect and correct their records.

We also support Section 613, dealing with the need for promotion of technical compatibility among cable systems, and would recommend that it be expanded to include compatibility between cable and other communications systems, particularly telephone. We would like to avoid the situation where a new technology that can more efficiently use cable lines is limited to using only telephone lines because of telephone's higher market penetration and an incompatibility in technology that might have been prevented.

We support the continuation of equal employment opportunity rules for the cable industry. We would like to see these rules made more effective. Again, we are also concerned that these rules be seen as establishing only minimum requirements, and not as precluding a city from negotiating for more diligent hiring and training requirements.

Finally, though not at all the least of our concerns, is the provision of S. 2172 that would eliminate the application to cable operators of the Fairness Doctrine, Equal Time, and Reasonable Access Rules. We strongly oppose the blanket prohibition of Section 610. So long as cable operators are permitted to program mass numbers of channels, Sections 312(a)(7) and 315 should apply to some degree. Effective requirement for uncensored access by local programmers would go a long way to reducing the need for concern about monopolization of the media, but until those are in place it is premature to eliminate the above-mentioned rules.

Finally, we urge the Committee to consider including a provision in S. 2172 to encourage the development of alternative models for development and ownership of cable television systems. Consumer cooperative participation in the ownership and operation of cable systems should be part of our national cable policy. Cooperatives have proven their value in numerous sectors of our economy—including housing, insurance, credit, and energy; they have provided services to areas that otherwise would have gone unserved; they have improved the quality and cost of goods and services; and they have provided consumers with greater control over business enterprises that are important to their daily lives. Cooperative ownership of cable has been a great success in places like Trempealeau County, Wisconsin.

What is needed, however, is additional research and development on the economics of consumer-owned cable systems. This information and technical assistance could prove invaluable as many of the smaller markets come up for franchise and refranchise. We urge the Committee to make use of the National Consumer Cooperative Bank, which has implemented a pilot project in Davis, California to learn more about cooperative cable development.

Again, Mr. Chairman, we applaud the progress being made in beginning this national debate on the future of cable television in America, and we appreciate this opportunity to be part of that process.

Senator **Goldwater**. Thank you.

Ms. Buske, we have got you down next.

Ms. **Buske**. Thank you very much, Mr. Chairman. My name is Sue Buske. I am executive director of the National Federation of Local Cable Programmers. The NFLCP is a grassroots membership organization whose members include community groups, schools, city governments, church groups, universities, and a broad cross-section of the American public interested in community uses of cable systems.

The NFLCP was organized in 1976 to aid such groups in fostering citizen participation in community uses of cable television, and developing creative access programing. The NFLCP now has over 2,000 members, both organizational and individuals, across the country who provide access programing in over 45 States.

The goal of the NFLCP is really not very different after all from one of the goals embodied in the Communications Act of 1934. We are seeking to develop local outlets for self-expression and to promote communications at a local level.

Our greatest concern with this bill is that it does not further these national goals. In fact, this bill creates new Federal bureaucratic power for managing and controlling what are essentially local decisions. It removes power from States and localities.

While we applaud the efforts of this committee to define the role that the Federal Government will play in development of the cable industry, we do not believe, and we do not think this committee believes, that centralization of regulatory authority is either necessary or appropriate.

The purpose of my testimony is to outline some of the ways in which the NFLCP believes the bill may be amended to best promote development of cable television's potential. We hope our suggestions will help the committee as it considers the appropriate Federal role in regulation of the cable industry. A full copy of proposed amendments to the bill is attached to my prepared statement.

Before going through a very brief section-by-section analysis of the bill, let me explain why NFLCP is opposed to removing power from the local level and removing it to the Federal Government and we think a policy which recognizes the primary need for State and local regulation is in the best interest of the public and of the cable industry.

First, cable has potential to provide far more than just entertainment services. For example, communities can use cable to provide diagnostic and other health services to the elderly or to those confined to their homes. The list can go on and on.

The bill, we believe, should encourage development of such services. To do this, we think it should provide wide latitude for each community to determine and develop the particular services which meet its needs.

Second, cable is essentially a local service. The examples of diversified services which I have just listed are likely to be developed at the local level. There is very little reason for masive dislocation of power from the State level to the Federal level.

Now I would like to turn to the bill itself and take a brief look at a couple of sections. First, the bill should make a explicit finding, recognizing the interest of the States in regulating cable. Section 601 as written fails to recognize these principles of Federalism. This section should make clear that the purpose of the bill is not to centralize power in Washington but is instead to achieve a national plan under which both State and Federal interests are recognized.

Next, the bill should be modified to state clearly that the statutory reservation of 10 percent of channel capacity for public access and 10 percent for leased access is a minimum not a maximum. Individual cities and cable operators must remain free to negotiate for provision of an additional channel capacity to meet the needs of the local service area.

Further, the bill defines a set-aside in terms of channels. Channels is a somewhat artificial standard. It can be one megahertz 6 megahertz or 10 megahertz. Therefore, we feel it is better to define the set-aside in terms of bandwidth.

Third, the bill creates a procedure by which the Commission can eliminate lease access requirements. There are a number of dangers in establishing any procedure under which access is curtailed, not the least of which is the procedural detail and expense involved in contesting the matter in Washington.

Should the Commission nonetheless establish such a procedure, it should explicitly require that the Commission consider foreseeable future uses of the cable channels before curtailing access.

Fourth, the bill provides that until there is a demand for access channels, such channels may be used by the cable operator. We have recommended an elimination of this section of the provision. Our experience with similar provisions indicate they create serious problems and provide little benefit. Public access programers commonly face serious difficulties in bumping cable operators from originally designated access channels once those operators begin to cablecast. Further, given the availability of cheap equipment for generating text information, channels could be used for cablecasting public service announcements. In essence, the channel need not remain blank.

In closing, I would like to close with two caveats. First, those of us in Washington sometimes end up arguing about legislation for the same reasons mountain climbers are said to climb mountains: because they are there. We ask this committee to seriously consider whether any legislation is required this year.

Second, it is difficult to describe what is going on in the cable industry. You can provide statistics, you can analyze trends, but until you go out into the individual communities as I have and see how cable systems are actually operating, it is impossible to comprehend the potential cable has for providing unique services in localities.

We would recommend that before any comprehensive legislation is passed, that this committee seek out the advice and information that citizens across this country can provide.

I would like to thank the committee again for its efforts in considering and trying to resolve the problems associated with the development of the cable television industry in this country. And I would be very happy to lend my 10 years of experience in the cable field to the committee and its staff.

[The statement follows:]

STATEMENT OF SUSAN BUSKE, EXECUTIVE DIRECTOR, NATIONAL FEDERATION OF LOCAL CABLE PROGRAMMERS

Mr. Chairman, I am the executive director of the National Federation of Local Cable Programmers. The NFLCP is a nonprofit organization whose members include community groups, schools, city governments, church groups and universities. The NFLCP was organized in 1976 to aid such groups in fostering citizen participation in community television and in developing creative public access programming.

NFLCP has over 2,000 individual members who provide organizational public programming in 45 states.

Our goal is really not very different from a goal embodied in the Communications Act of 1934: we are seeking to develop local outlets for self-expression and to promote communications at a local level. Our greatest concern with this bill is that it does not further these national goals. In fact, this bill creates a new federal bureaucratic power for managing and controlling what are essentially local decisions. It removes power from states and localities.

While we applaud the effort of this committee to define the role the federal government will play in development of the cable industry, we do not believe—and do not think this committee believes—that centralization of regulatory authority is either necessary or appropriate.

The purpose of my testimony is to outline some of the ways in which the NFLCP believes the bill may be amended to best promote development of cable television's potential. We hope our suggestions will help the committee as it considers the appropriate federal role in regulation of the cable industry. A copy of proposed amendments to the bill is attached to my prepared statement.

BACKGROUND

Before going through a section-by-section analysis of the bill, let me explain why the NFLCP is opposed to removing power from local levels to the federal government, and why we think that a policy which recognizes the primary need for state and local regulation is in the best interest of the public and the cable industry.

First, cable has potential to provide far more than entertainment services. For example:

Communities can use cable to provide diagnostic and other health services to the elderly or to those confined to the home;

Communities can use cable to provide job training services, educational services, or to deliver other social services efficiently;

Cable systems can be utilized for load management by private or public electric utilities, providing significant savings for the utility and resulting in more efficient use of our nation's energy resources;

Cable can guarantee a local mechanism for electronic discussion and debate of issues specifically affecting the day to day lives of every citizen in a given community;

Cable systems can be utilized to provide traffic control, security services and alarm services. If, for example, homes in an area are hooked to the fire department, the fire department will be able to respond more quickly to alarms reducing loss of life and dproperty, and ultimately (we hope) insurance rates.

The bill should encourage development of such services, and to do this, we think it should provide wide latitude for each community to determine and develop the particular services which meet its needs.

Second, cable is essentially a local service. The examples of diversified services which I just listed are all likely to be developed by local individuals and institutions at a local level. There is very little reason for a massive dislocation of power from the state level to the federal level.

The fact remains: this is an industry experiencing explosive growth. This is an industry where the opportunity for profits appears so great that companies voluntarily—and I stress voluntarily—offer to provide services and channel capacity far exceeding the minimum required by the franchising community. Moreover, they are willing to make such offers despite the fact that they will be receiving a nonexclusive franchise. I have yet to hear of a cable company being forced to sign a franchise. Moreover, localities and states have a special interest in retaining regulatory control over cable systems. It is very likely that there will be only one cable system in every community. In most communities today, despite the fact that cable operators have a nonexclusive franchise, only one system is in operation. When more than one system operates, the result has generally been ineffective service and poor penetration. Services like MDS or subscription TV will not duplicate cable services and can only provide limited, if any, competition. To use one example: cable television is in 4,500 communities; subscription TV is available in about 23 cities.

The real result of centralizing power will, we think, be twofold: first, it will create a federal roadblock to participation in cable by those who cannot afford to present their case in Washington. Second, to the extent the bill takes power away from states and localities, it will prevent the very experimentation and diversity in development of the industry which our federalist system is meant to preserve. Where there is a genuine federal interest, legislation is appropriate; where there is not, we believe it is short-sighted to short-circuit state and local regulation.

SUGGESTED AMENDMENTS

Turning to the bill itself, we advocate the following:

1. The bill should make an explicit Finding recognizing the interest of the states in regulating cable. Sec. 601 as written fails to recognize principles of federalism. This section should make clear that the purpose of the bill is not to centralize power in Washington, but is instead to achieve a national plan under which both state and federal interests are recognized.

2. The bill should make clear that one of its Purposes is to encourage outlets for community self-expression and to promote diversity in the public's choice of programs and types of services. This purpose is consistent with development of the diverse capabilities of the industry.

3. Section 603 should be modified to avoid massive dislocation of power from the state to the federal level. As written, the bill appears to give the FCC exclusive jurisdiction as to "matters dealt with" in the title. It is not clear what this phrase means. The provision could be interpreted sweepingly, for example, to prevent states or localities from contracting with willing cable operators for additional dedicated channel capacity or to prevent states from establishing local boards to aid the cable operator in developing programming responsive to community needs. To prevent such improper results, while making it clear that as to some matters, federal rules must reign supreme, the "exclusivity" provision should be eliminated and the bill should provide that states can regulate unless such regulation is directly prohibited by or actually inconsistent with federal regulation.

4. Similarly, the statute should be modified to protect existing contracts between cable operators and communities. Section 603(3) appears to give the bill retroactive effect. Thus it would impair contracts freely negotiated between cable developers and communities (and thus raise Constitutional questions). It would create chaos.

5. We believe a number of definitions need to be added or amended. Of particular importance are the definitions of "basic services" and "leased channel."

In the bill, "basic services" are defined by the cable operator. Thus, the operator could determine that basic services involve 10, 2 or no channels. "Basic services" are now normally defined by agreement between the cable operator and franchisor. There seems litle reason to change this arrangement and every reason not to give the cable operator absolute power to define "basic services."

The bill does not define "leased channels." We propose a definition which reflects industry practice while avoiding abuses which could result if a cable operator could meet its leased access requirements by leasing channels to itself.

6. The bill's prohibitions against regulation of ownership go too far. Consonant with principles of federalism, and to encourage diversity in development of cable systems, states and localities should be permitted to establish regulations requiring, for example, minimum local ownership of cable systems and establishment of community boards to aid in programming such systems.

7. Requiring state or local governments to acquire cable systems at "fair market value" in all cases is anything but fair. The bill should permit states or localities to provide for reacquisition of the franchise under whatever terms have been fairly negotiated with the franchisee. Specifically, state and local governments should be able to enter into leaseback, sellback or other arrangements. The federal government should not foreclose financing options for state and local governments. Further, where is no justification for guaranteeing a cable operator who violates the terms of its franchise agreement a right to the "fair market value" of its system—but that is what this bill does.

8. The bill should be modified to state clearly that the statutory reservation of 10 percent of channel capacity for public access and 10 percent for leased access is a minimum and not a maximum. Individual systems must remain free to negotiate for provision of additional channel capacity to meet the needs of the local service area.

Further, the bill defines the set-aside in terms of "channels." "Channels" is in some ways an artificial standard—a channel can be 1 MHz, 6 Mhz or 10 MHz. Therefore, we feel it is better to define the set-aside in terms of bandwidth.

9. The bill creates a procedure by which the Commission can eliminate leased access requirements. There are a number of dangers in establishing any procedure under which access is curtailed, not the least of which is the procedural delay and expense involved in contesting the matter in Washington. Should the Commission nonetheless establish such a procedure, it should explicitly require that the Commis-

sion consider foreseeable future uses of the cable channel before curtailing access. Access requirements should not be eliminated because current users might meet their communications needs elsewhere, if there are a number of identifiable potential users for whom access to cable is critical.

Further, there should be a corresponding procedure for reinstating access requirements.

We think the Commission ought to consider the uses to which the cable operator proposes to put the system and the alternatives available to the cable operator to satisfy this use. This would require the Commission to consider the equities as between the operator seeking to eliminate access channels, and those who would use them.

Finally, because increased access is thought to serve the public interest in diversity of voices, we believe the burden of proof in any proceeding ought to be on the person seeking to eliminate access.

10. The bill provides that until there is demand for the access channel, such channels may be utilized by the cable operator. We have eliminated the Section containing this provision. Our experience with similar provisions indicates that they create serious problems and provide little benefit. Public access programmers commonly face serious difficulties "bumping" cable operators from dedicated channels once those operators begin to broadcast. Further, given the availability of cheap equipment for generating text information, channels could be used to broadcast public service announcements. The channel need not remain blank.

11. Section 607(b) requires states or localities to restrict rates on a "nondiscriminatory" basis. This phrase is overly broad and might prevent useful and legitimate governmental discrimination as between, for example, schools and businesses. We believe the bill should simply prevent "unreasonable" discrimination.

12. Section 607 of the bill goes too far. States and cities must at least have the option to regulate leased rates in the 10 percent required leased channels and in those areas freely negotiated by the city and cable operator. The simple reason for allowing states and localities to exercise the power to regulate rates is that rate regulation may be the best way of ensuring that a wide range of potential programmers such as small businesses and community groups will have the opportunity to enter the market and provide innovative services. Again, we stress, cities and states must continue to have the option which they may or may not choose to exercise.

13. Section 608 of the bill protects the cable operator from civil and criminal liability for libel. Such a provision is needed and federal legislation is appropriate in this area. However, the bill goes a step too far. It protects the operator who knowingly or maliciously abets the libel, but who may not have an economic interest in the program carried on the cable. We suggest that the bill be amended to immunize operators who do no more than their jobs—that is, who provide access at appropriate fees.

14. We believe the bill should include a section which provides for interconnection of cable systems under appropriate circumstances. Such a provision recognizes two principles: first, it may be in the national interest to have an interconnected system of cable companies from which no company should be excluded, Second, while cable service may develop around city limits, cable service should be aimed at communities. The law should allow one community to hook up with another to share, for example, public access cablecasting facilities.

That is an overview of the amendments we propose. Our goal was to promote diversity, and to foster debate by insuring that a variety of voices would have access to cable.

I close with two caveats. First, those of us in Washington sometimes end up arguing about legislation for the same reason mountain climbers are said to climb mountains: it's there. We ask this committee to seriously consider whether any legislation is required this year. Second, it is difficult to describe what is going on in the cable industry. You can provide statistics, you can analyze trends, but until you go out to individual communities and see how cable systems are actually operating, it is impossible to comprehend the potential cable has for providing unique services in localities. We would recommend that before any comprehensive legislation is passed, that this committee seek out the advice and information citizens in communities across this country can provide.

I would like to thank this committee again for the efforts it is making to consider and resolve problems associated with the development of the cable television industry in this country, and I would be happy to cooperate with the committee and its staff in any way I can to forward its work.

S. 2172—Proposed Revisions of the National Federation of Local Cable Programmers

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Telecommunications Act of 1982."

(b) The Communications Act of 1934 is amended by inserting immediately after Title V the following new title:

"TITLE VI—CABLE TELECOMMUNICATIONS ACT

"FINDINGS

"Sec. 601. The Congress hereby finds that—

"(1) cable systems are engaged in interstate commerce through the origination, transmission, distribution, and dissemination of broadband telecommunications services;

"(2) The expansion and development of the potential of cable telecommunications is an appropriate concern of the federal government and each of the several states; further, the business of constructing and operating cable systems for the dissemination of broadband telecommunications services to the public is affected with a public interest, and regulation of such business is a concern of the federal government and each of the several states of the United States;

"(3) it is necessary and appropriate for the Federal Government to establish and maintain a national policy for cable telecommunications to assure the evolution of cable as a medium in its own rights; and

"(4) a national and uniform policy for cable is necessary to prevent the emergence of conflicting regulation and to allow the growth and development of cable as a medium which will be responsive to and serve the needs and interests of the public.

"PURPOSES

"Sec. 602. The purposes of this Act are to—

"(1) create a jurisdictional framework which apportions the authority to regulate cable systems between the Federal Government and each of the several States of the United States; [and]

"(2) allow cable systems to compete in the marketplace with other providers of telecommunications services to the public; *and*

"(3) to encourage development of outlets for community self-expression and promote diversity in the public's choice of programs and types of service.

"STATEMENT OF AUTHORITY

"Sec. 603. The provisions of this title shall apply as follows:

"(1) The Commission shall have jurisdiction and exercise authority with respect to cable systems solely as specified in this title. [Commission jurisdiction under this title is exclusive and no other Federal] *However, a* State instrumentality or agency or any political subdivision thereof [shall] *may* make or establish rules or policies regarding [the matters dealt with in this title.] *cable telecommunications to the extent such rules or policies are not directly prohibited by federal law or otherwise inconsistent with the Commission's exercise of jurisdiction under this title.*

"(2) Any cable system shall be subject to the provisions of this title and such orders, rules, or regulations as may be adopted pursuant thereto and any federal rule, regulation order or standard applicable to cable systems shall, to the extent inconsistent with the provisions of this title, be null and void.

"(3) A State, instrumentality, board, commission or authority or any political subdivision thereof may adopt or continue in force any law, rule, regulation, order, or other standard affecting cable systems, unless such law, rule, or regulation, or order or standard is inconsistent with the exclusive grants of authority under this title and is not forbidden to any governmental authority under this title. *Provided nothing in this title shall relieve any cable company of any obligations under a contract or other agreement with any state, instrumentality, agency, board, commission or authority or any political subdivision thereof, or impair the rights of such entities to enforce such contract or agreement entered into prior to the enactment of this bill.*

"DEFINITIONS

"Sec. 604. For purposes of this title, the term—

"*(1) 'bandwidth' means a measure of frequency (spectrum) use or capacity. A TV channel uses a bandwidth of 6 Mhz (6 million cycles per second) whereas a voice transmission by telephone requires a bandwidth of only 3 Khz (3 thousand cycles per second).*

"[(1)]*(2)* 'basic service', 'basic cable service', or 'basic subscriber service' means the retransmission of broadcast signals and any other service [as determined by a cable operator;] *defined as 'basic' service under the franchise agreement, ordinance or other instrument pursuant to which the cable operator provides service;*

"[(2)]*(3)* 'broadband telecommunications' (no change)

"[(3)]*(4)* 'broadcasting' means telecommunication by radio intended to be received by the public, directly or by the intermediary of relay stations;

"[(4)]*(5)* 'cable channel' or 'channel' means [that portion of the electromagnetic frequency spectrum used in a cable system] *6Mhz of the electromagnetic frequency spectrum or such other portion of that spectrum as the Federal Communication Commission determines is ordinarily used in, and reasonbly necessary for, the propagation of a television signal over a cable system.*

"*(6) 'leased channel' means a channel which is leased, sold or otherwise transferred to the control of a a person other than the cable operator, its subsidiaries, parent company or subsidiaries of the parent company for the purpose of providing telecommunications services, the content of which is not under the control of the cable operator.*

[Other definitions remain the same, except for numbering.]

"[12)]*(14)* 'person' means an individual, partnership, association, joint stock company, trust, corporation, *cooperative*, or any governmental authority, *including a state or political subdivision or agency thereof.*

"OWNERSHIP OR CONTROL OF CABLE SYSTEMS

Sec. 605. (a) Except in the case of the antitrust laws of the United States and to the extent otherwise provided in subsections (b), (c) and (d) of this section, no executive agency of the United States, including Commission, and no state or political subdivision or agency thereof, including a cable franchising authority, shall have the authority to prohibit or otherwise regulate, the ownership of cable systems by any person, *except that, since the purpose of this section is to promote diversity of ownership structures and development of programing alternatives responsive to community needs, nothing contained in this section shall prohibit a State, political subdivision or agency thereof from establishing regulations reasonably calculated to achieve such goals, including but not limited to regulations requiring minimum local ownership of cable systems and establishment of community boards to aid in programing such systems.*

[Section (b) remains the same.]

"(c) Notwithstanding the provisions of subsection (a) of this section, a State or any political subdivision or agency thereof may not [own or] acquire an ownership interest in any cable system, unless such State, subdivision, or agency acquires such ownership or interest at not less than fair market value [and not by condition of franchise unless the franchise provides for purchase at fair market value.]. *However, nothing in this section shall prevent a State or political subdivision or agency thereof and a cable system operator from agreeing by condition of franchise or otherwise as to price or means by which an ownership interest shall be passed to a state, subdivision or agency thereof. Nor shall anything in this section be construed to prohibit a state, or political subdivision or agency thereof from providing for acquisition of a cable system should the cable system operator fail to comply with the terms of its franchise agreement.* [In any case in which any such State subdivision or agency has or acquires any such ownership or interest in accordance with this subsection, such State, subdivision or agency shall, in no case, own or control, directly or indirectly, any of the programming on such cable system except as provided in section 606(a)(1).]

[Sections (d) and (e) remain the same.]

"*(f) No action taken by a political subdivision of a state in the course of considering, granting, or denying a franchise, and no action taken by a political subdivision in refusing to consider, grant or deny a franchise shall subject the political subdivision to liability under the antitrust laws of the United States.*

"(2) The Commission shall prescribe regulations necessary to carry out the provisions of this section within the 180-day period following the date of its enactment.

"DEDICATION OF [CHANNEL] *BANDWIDTH* CAPACITY

"Sec. 606. (a) The Commission shall require cable systems having twenty or more television broadcast channels (120 MHz or more of bandwidth) for immediate or potential use to dedicate or set aside—

"(1) 10 per centum of such [channesl] *bandwidth* for use by *local* public, educational, and governmental *access* channel programers; and

"(2) 10 per centum of such [channels] *bandwidth* for use by *local* leased channel programers.

"(3) Such dedicated bandwidth shall be required in addition to any dedicated channels or bandwidth which the cable operator may agree to provide as a condition of franchise or otherwise and which may include channels dedicated specifically to local use.

"(b) Determination of what constitutes a public access, educational, or governmental local channel programer shall be made as provided in the franchise agreement or other applicable rule, regulation or ordinance.

"[(b)(1)] *(c)(1)* The obligation to provide access imposed under paragraph (2) of subsection (a) of this section (relating to leased channels) shall cease upon determination by the Commission that there are reasonably available alternatives for persons desiring to provide programing services to the public in a particular geographic area or market.

"(2) In determining whether there are reasonably available alternatives in the relevant area or market, the Commission shall consider—

"(A) the number and size of other providers of [service] *access*.

"(B) the extent to which [service] *access* is available from other providers;

"(C) the ability of such other providers to make such [service] *access* readily available at comparable rates, terms, and conditions;

"(D) other indicators of the extent of the competition; and

"(E) the extent to which eliminating the obligation to provide access would adversely affect foreseeable future uses of such dedicated channels;

"(F) the use to which the cable operator proposes to put the channel and the alternatives available to the cable operator to satisfy this use.

"(3) Any person may at any time petition the Commission to reinstate the access requirements should it appear that reasonable alternatives are no longer available.

"(4) In any proceeding begun under subsection (c)(1) or (c)(3) the party desiring to limit the access obligation shall have the burden of showing that reasonable alternatives exist.

"[(c)] *(d)* The channels referred to in paragraphs (1) and (2) of subsection (a) of this section shall be made available on a first-come, first-served, nondiscriminatory basis.

"[(d) Until such time as there is demand for each channel full-time for its designated use, public, educational, governmental, and leased channel programing may be combined one or more channels. To the extent time is available therefor, such dedicated channels may be used for other services.]

"RATE REGULATION

"Sec. 607. (a) Each State or political subdivision or agency thereof, or cable franchising authority, is authorized to establish, fix, or otherwise restrict the rates, [on a non-discriminatory basis,] charged for the use [or sale] of cable channel capacity or time on such channels referred to in paragraph (1) of subsection (a) of section 606.

"(b) Each State or political subdivision or agency thereof, or cable franchising authority, is authorized to establish, fix, or otherwise restrict the rates[, on a nondiscriminatory basis,] charged for basic services *and leased channel services described in 606(a)(2) or (a)(3).*

"(c) In exercising authority under sections (a) and (b), no state or political subdivision or agency thereof shall (1) make or grant any unreasonably discriminatory rate to any person or subject any person to any unreasonably discrimination; or (2) maintain any unreasonable difference in rates, charges, services or facilities or in any other respect between classes of service.

"[(c)] *(d)* No executive agency of the United States, including the Commission, and no State or political subdivision of agency thereof, or cable franchising authority, shall have authority to establish, fix, or otherwise restrict the rates charged channel programmers by cable system operators for the use of channels [described in paragraph (2) of subsection (a) of section 606.] *except as otherwise provided in this section.*

"CRIMINAL AND CIVIL LIABILITY

"SEC. 608. Nothing in this title shall be deemed to affect the criminal or civil liability of channel programmers pursuant to the law of libel, slander, obscenity, incitement, invasions or privacy, false or misleading advertising, or other similar laws, except that the cable operator shall not incur such liability [for any program] *because it carries a program* [carried] on any public, educational, governmental, or leased channel referred to in paragraphs (1) and (2) of subsection (a) of section 606, or [for any] *because it carries a* program originated by a channel programmer having no ownership affiliation with the cable system operator.

[Sections 609, 610, 611, and 612 remain the same.]

"TECHNICAL STANDARDS AND INTERCONNECTION

"SEC. 613. *(a)* The Commission shall ensure that cable system operators conform to, technical standards necessary to promote the compatibility and interoperability of cable systems, the compatibility of the receivers and other terminal equipment connected to such systems by cable subscribers, and to prevent harmful interference to radio and television communications. No person shall manufacture, import, sell, offer for sale or lease, ship or use devices which fail to comply with such regulations promulgated by the Commission.

(b) Whenever the Commission, upon application of any State commission or any person engaged in provision of telecommunications services and after notice to each state commission and public utility affected and opportunity for hearing finds that establishment of an interconnections necessary or appropriate in the public interest, it may be order direct a cable operator (if the Commission finds that no undue burden will be placed upon the cable system thereby) to interconnect and share the use of its facilities with the facilities of one or more persons engaged in the provision of telecommunications services and to sell, exchange or otherwise transmit to the interconnected system such signals as the Commission deems appropriate in the public interest. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

Senator GOLDWATER. Thank you very much.

I am inclined to agree with your last suggestion. The problem is I made a promise, and I think we ought to get it out of the way.

Mr. Brown, you are next.

Mr. BROWN. Mr. Chairman, Senator Pressler, members of the staff, my name is Richard Brown. I am general counsel to the Society for Private and Commercial Earth Stations, a trade association known as SPACE. We represent the manufacturers and the distributors and the users of Earth stations for private use.

This industry, Mr. Chairman, did not exist 3 years ago. Since that time it has come to be a quarter of a billion dollar a year industry. It is a renaissance of the electronics industry in the United States. As you particularly are well aware, we have lost a great deal of electronics manufacturing capacity in this country to overseas plants, from AM radios, FM radios, TVs, video cassette recorders to stereo systems. They are generally in off-shore production these days.

We now have an industry in this country manufacturing Earth stations and the receivers for the Earth stations that represents a quarter of a billion dollar industry that did not recently exist. Part of this industry uses technology that is helpful, for example, for the military. Low noise amplifiers are the heart of the receiving capacity of these instruments. In other ways it is 1930 technology, a receiver and antenna. The LNA, as you know, is used very extensively in military applications. That is what the industry segment is about.

But also very important is what it does for the public. You have heard plans for many years on serving rural America: with high-powered television, low-powered television, cable television, MDS, multipoint distribution systems and subscription television. All those methods generally require a large audience to make them economically viable, and yet Rural America has remained underserved.

There are over 10 million homes in this country that receive service only from three or less networks. Today we have the ability—and it has been proven in 100,000 homes in the United States—that one can receive as much communication in the middle of South Dakota and the middle of Arizona, not near any city, by putting up a satellite Earth station. You could then have access to all the programs that the cable systems provide to their consumers.

Now, a lot of that programing is meant to be available free of charge, and some of it is not meant to be available free of charge to the cable subscribers. That is the problem we have here and that is the problem we have with section 705 of the bill.

There is an existing provision of the 1934 act called section 605. Generally it says you shall not intercept and divulge or receive and use a signal. That is a 50-year-old statute and it was passed a long time before the advent of satellite technology.

What this bill would do is add teeth to those old provisions and say that somebody can bring a law suit for violation of section 605. We do not know exactly what section 605 would mean if it went to the Supreme Court and somebody brought a suit against you, but I would like to take you through the analysis.

You said you are considering building an Earth station in your back yard as many thousands have erected throughout the country. If you did this, this is what might happen to you. You could watch certain of those programs—let's say it was the superstation, Ted Turner's, channel 17 from Atlanta. He could care less if you did. If you turned the dial to another station, let's say it was Home Box Office, or Showtime, which is owned by Viacom, or the Movie Channel, which is owned by Warner—and those gentlemen were sitting back here earlier this morning talking to you about access—if you watched their programing, they could bring a law suit against you.

This bill would provide a private right of action for one of those gentlemen or the Motion Picture Association of America or one of the movie producers, to bring an action against you or anyone else. And if they won, they could obtain statutory damages for your violation this act of $250 to $10,000 if there were no actual damages. In fact, if you were to do it for commercial advantage, the damages go up to $50,000.

Now, if you are sitting around in your house, it probably would not be for commercial advantage: The U.S. Attorney could also have you tried for violating the statute, and you could be fined $1,000 or be put in jail for 6 months for watching Home Box Office.

Now, I think that is pretty ridiculous. We have asked our people, our members to write to Home Box Office, to write to Showtime and to write to these other companies. My testimony has refusals from all these companies to sell the programing to the users of Earth stations.

We have volunteered to pay, to pay a royalty on the sale of this equipment to the Motion Picture Association members and to the packagers of this programing, the same thing they are now asking for from the Judiciary Committee with respect to tape recorders. They have refused us. On the other hand, they are coming to other committees asking for royalties.

We don't think the American public ought to go to jail or ought to be fined or ought to have law suits brought against your sons or daughters or mine for watching television.

Thank you very much.

[The statement follows:]

Statement of Richard L. Brown, Vice President and General Counsel, SPACE

INTRODUCTION

Mr. Chairman, members of the Subcommittee, I am Vice President and Counsel to SPACE, the Society for Private and Commercial Earth Stations. SPACE is the trade association representing the owners and users (consumers), distributors and manufacturers of satellite earth stations (TVROs). Our membership includes individual owners and users of satellite earth stations for private and commercial use, as well as small and large (including New York Stock Exchange) companies that produce earth station equipment. Our membership comes from nearly all of the 50 states and from several foreign countries.

SPACE welcomes the opportunity to participate in these hearings and to comment upon S. 2172. Our comments on the legislation will focus on the adverse effects that the adoption in its present form of section 705(b)-(e) the "Signal Piracy" provisions, will have on the future of communications in this country. Presently, these provisions are anticonsumer, anticompetitive, and antitechnology. Couched in terms of increasing the penalties on existing law, the provisions go much further. The bill makes the motion picture industry into a super-cop to determine what U.S. citizens are viewing on television. And, if the industry does not approve of what you view, it can sue. Judging from some recent Hollywood output, I could not trust the Motion Picture Association of America (MPAA) or its member companies to be a censor for my kids.

Enactment of these provisions would also stifle the renaissance of a U.S.-based electronics industry. Having lost AM, FM, stereo, TV, VCR and a cost of other electronics manufacturing to foreign production, this country can ill-afford to stamp out a new electronics industry which in two short years has reached a quarter billion dollars in retail sales.

Before addressing these matters in full, a brief look at the past and present may be helpful.

PAST AND PRESENT

Broadcasting

The advent of commercial television in the late 1940s produced much excitement and promise. In the few major cities that had television stations, the lucky individuals who owned television receivers were the center of neighborhood attention. People dropped by to view pictures that magically appeared in one's living room. In some cities, there were eventually two or three channels, and as the 1950s progressed, some major cities obtained more and more television. Television also came into smaller markets, so that by the end of the decade most metropolitan areas had at least a few channels of television. Much of the country, however, did not.

The broadcasting system depended on advertising—both national and local—and, thus, on obtaining large numbers of viewers. Of economic necessity, the broadcasting system focused on serving the large population centers. Concern was always expressed for the rest of America. There were all kinds of plans: to have a few major stations with wide broadcasting areas; to have transmitters on airplanes to cover wide areas; to have a widespread UHF television service. The latest has been the plan for low power television, in order that small communities—even neighborhoods—could have television stations.

But as we look at the present facts of life, after 30 years of television, the Communications Act goal of making "available, so far as possible, to all the people . . . an efficient, nationwide . . . service" is not a reality. If you do not live in a major population center, you are shortchanged. The smaller the community, generally speaking, the less you have. And if you live outside of major population areas, you may have little or nothing. In some areas of the country, a television viewer can receive the signals of well over a dozen channel off-the-air; in some areas, none. Three and one-half million households, or ten million Americans, receive one or no television signals. Fifteen million Americans receive three or fewer television signals.

Cable television

Almost simultaneously with the development of over-the-air broadcasting came the development of cable television—ever expanding its capacity from one to three to five, twelve, thirty and now over one hundred channels. In 30 years, for a variety of reasons including excessive regulation, progress has been slow. There are approximately 25 million cable television subscribers today. Most of the newer cable subscribers are obtaining, via satellite, a wide variety of programming, much of which has not been available before. Cable television still has not penetrated many of our central cities and most of our rural communities.

THE LIKELY FUTURE

It is unlikely that the number of full power conventional over-the-air television stations will grow significantly. Low power television, multipoint distribution service (MDS) and subscription televison (STV), while expanding, do not offer the same viewing opportunities as the multi-channel capability of cable. The history of MDS and STV replicates that of broadcasting and cable. They thrive on dense populations. Will cable be the answer?

Large segments of America will never have cable. It is logically predictable that much more of America will be underserved by cable than is underserved by over-the-air broadcasting. Yes, cable will be able to reach out to the public less than broadcasting has. Cable started and enjoyed its early prominence largely in small cities—but drive a short distance outside the city limits and there still is no cable. Cable loves population density and abhors distances. Where population density is less than 30 dwellings per mile, there is little cable. Cable may never come to these areas. It simply is not economical to supply such areas. There may never be cable in all areas of some cities, either. Construction in the major cities can run to several hundred thousand dollars per mile. Central cities largely populated by low income residents may not have the economic base to be cabled. Thus, it is entirely possible that in excess of 30 percent of the U.S. population will never have a chance to obtain cable service.[1] It is almost a certainty that well in excess of 30 percent will not have cable in this decade.

There appears little hope for improvement in television viewing opportunities for large segments of the American public through these traditional media.

ANOTHER POSSIBILITY

There could be a different kind of future for Americans who will not obtain cable.

Imagine the possibility that all of these Americans could view programming delivered by satellite—the same channels now available on cable systems. Imagine Americans who now have no television, or access to only one, two or three network stations, having access to:

24 hour a day news;
Independent television stations from Atlanta, Chicago, and New York City;
Religious stations;
Children's channels;
Women's programming;
Minority programming—for Blacks and Hispanics;
24 hour a day sports;
Coverage of the U.S. Congress;
Cultural channels;
24 hour a day feature films.

Imagine being able to install in one's backyard or on the rooftop or the grounds of an apartment house a satellite antenna so that all of these channels could be viewed in the privacy of one's own home. Is this some pipedream—or a realistic view of the future of communications in America?

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[1] Canada, which has been cabled for years, passes approximately 70 percent of its homes with cable and appears to have proportionately much less of a population outside of metropolitan areas than does the United States.

Five years ago, a satellite earth station installation cost $100,000. The FCC had a rule, in effect requiring that antennas be 10 meters in diameter. The FCC changed its rule and five meter earth stations became the norm for the cable television industry. Prices tumbled to $25,000 for a typical earth station installation. But that was only the beginning.

Today, there are some fifty manufacturers of earth stations and receivers for the "backyard" market—a $100 million industry in 1980, according to Sports Illustrated, and SPACE estimates a quarter of a billion dollar industry in 1982. It is an almost completely U.S.-based electronics industry—perhaps the only one in existence. It provides thousands of Americans with jobs in the manufacturing, assembly, distribution and sales sectors. Some of our major manufacturers are beginning to establish significant export trade helping U.S. balance of payments. The satellite earth station business is booming.

As receiver and antenna design has progressed prices have dropped so that the range is now $3,500 to $10,000 for home installations—less than 1/20th the price of four years ago. There are some 40 thousand installations in place, and units are now being produced at a rate in excess of 3,000 per month. There would be considerably more produced, but for the uncertainty caused by legislation such as Section 705 (b)-(e) of S. 2172

Direct Broadcast Satellites (DBS) are supposed to be a thing of the future. They are not. They are here in the present., You could be viewing satellite programming in your home today, just as many of your constituents are doing. But it is still early enough to shut down the technology. It is early enough to prevent the future from happening. It is early enough to stifle technology and keep a large part of the television viewing public as second class citizens.

Section 705 (b)-(e) of this bill could do just that.

NOT SIMPLY A BEEFING UP OF EXISTING LAW

Section 705 (b)-(e) penalties are intended to be added on to existing Section 605 of the Communications Act, an over 50-year-old law entitled "Unauthorized Publication or Use of Communications."

It will no doubt be asserted that these provisions amount to no more than a beefing up of penalties under existing law. in reality, they are much more. One inevitable consequence is a major court decision on whether the public can view satellite transmissions without subscribing to cable television. Enactment of Section 705 (b)-(e) would let loose in this land a plethora of lawsuits for television viewing of subscription programming—suits against manufacturers, distributors, dealers, and—most importantly—consumers. It would invite a private right of action right of action against owners of earth stations to determine the applicability of Section 605. It would invite Hollywood producers to harrass U.S. citizens who view the "wrong" television programs. Proposed Section 705 (b)-(e) is substantially identical to H.R. 4727, introduced by Congressman Waxman (D-CA). The floor remarks accompanying the introduction of that bill, the FCC testimony, as well as the debate in the hearings, presume present Section 605 does apply to earth station use. By increasing penalties this bill ups the ante over the uncertainty of whether Section 605 applies, and thus further inhibits technological initiatives.

The question we pose to the Congress is this: Why have a court apply a 50-year-old statute to tell the public whether they have a right to view widely distributed programming which can be easily received?

The statute was written before the advent of satellite technology. Passage of the bill could have the effect of allowing a court to state that viewing programming from satellites is illegal. Such a decision, we submit, is a legislative decision, and should be based on your views of communications policy—not on an interpretation of an old law written for a different technology and for a different era. In addition, Section 705 (b)-(e) has nothing to do with cable television. The existing Section of the law that it proposed ot supplement, Section 605, has never been applied to cable television. Frankly, we are at a loss to determine why it is included in legislation directed to cable television.

Enactment of the bill in its present form will effectively stem the rapidly advancing technology in the ground segment of the satellite industry. Manufacturers cannot afford to have uncertainty. Enactment could deprive multi-channel reception opportunities to a large segment of the American public: Americans who will never receive cable television.

SPACE DOES NOT OPPOSE SANCTIONS AGAINST THOSE WHO SEEK TO AVOID PAYMENT

Recently, a market has sprung up in "bootleg" or "pirate" receivers which are capable of receiving both multi-point distribution service and subscription television services. These receivers are marketed specifically so that the purchaser can avoid payment of the monthly subscription charge. We are sensitive to the legitimate concerns that the MDS and STV services and program suppliers have. We would support increased penalties in this, or any other, bill which are intended to stem this activity. However, for several reasons, extension of the penalties to govern satellite earth station reception is an entirely different matter.

First, there is no evidence of which we are aware taht MDS or STV operators are seeking to withhold their service from those willing to pay for them. Second, MDS and STV transmissions are single channel subscription services—in other words, the only purpose for an "unauthorized" MDS or STV unit is to receive the subscription services, without payment of the fee. In contrast, there are dozens of channels of programming that are readily available on United States domestic satellites. And only one category, the subscription services, has uniformly refused to deal with the backyard earth station market, thereby denying service to the public. Repeatedly, SPACE and its members have offered to pay the suppliers of subscription services a marketplace rate for those services. Checks for viewing these services are routinely returned to their makers. Attached to this testimony are a stack of letters demonstrating the major satellite program packagers' refusal to deal with, or accept payment from, backyard users for viewing the signals which are transmitted into their homes.

This denial of service via satellite to the American public stands in stark contrast to the interests of MDS and STV operators in protecting their service from those who would take it without payment.

THE EFFECT ON THE AMERICAN PUBLIC

When the penalties proposed in Section 705(b)-(e) of S. 2172 are applied to the use of earth stations, some totally unreasonable results will be reached. For example, an individual could be fined merely for tuning the dial on a satellite receiver (very much the way one tunes the dial of a television set) if, in the process, he happened to receive a subscription service which he was not "authorized" to watch. On the other hand, if in fact he wished to view that subscription service and offered payment for it, and the payment were refused, he could nonetheless be made a criminal and jailed under the bill's provisions. Some have facetiously suggested there should be separate penalties for minors in the event a child tunes his parents satellite receiver from "Seasame Street," which he is allowed to watch, to "Nickelodeon", which is is not. We submit that no one should be given the right to peer into private homes for the purposes of determining what one is watching on one's television set. We also believe that the government has no business in establishing a law which allows and encourages others to make such determinations.

SPACE is not alone in voicing these concerns. In his testimony on H.R. 4727, the Federal Communications Commission's General Counsel pointed out the "special problem" that passage of that bill would pose to backyard earth station owners and urged that "particular attention" be paid to this area by the Committee. He recommended various amendments which would carve out backyard dish owners from the penalty provisions of the bill. He went on to urge that Congress closely examine the refusals to deal which satellite earth station owners were encountering.

The Congressional Research Service (CRS), in its study on "Unauthorized Home Over-the-Air Reception of Entertainment Programs," also raises many problems with the provisions of the proposed "signal piracy" legislation. Principally, CRS questions whether passage of the bill would, in fact, stop signal piracy:

"* * * it is not clear that H.R. 4227's provisions increasing penalties for violating Section 605 and providing for recovery of private damages for violations will ultimately have the desired effect of combatting signal piracy because application of Section 605 itself is unclear."

It points out that if the bill was passed and the rationale of existing decisions made under Section 605 was carried over, some unintended results would occur:

"Selling frequency lists of common carrier services, and manufacturing and selling radios intended to receive marine or mobile telephone calls, police and fire communications, and similar signals, would appear to arguably be assisting in reception of signals, the divulgence of which is prohibited by Section 605."

CRS also raises significant First Amendment concerns with the legislation:

"It would appear that an individual in a rural area might claim a right of access to informational programming on the satellites, for example, if no comparable programming is available to the viewer . . . it might be asserted against a programmer who refuses to sell permission to watch the signals over the satellite feed. Such a case would appear to be especially strong where the applicant does not have any other means of access to such programming."

Finally, CRS recommends some six alternatives to passage of the proposed "signal piracy" legislation, including adoption of a point of sale license. (See discussion below.)

THE POSITION AND MOTIVATION OF THE SUBSCRIPTION SUPPLIERS

In his testimony on H.R. 4727, HBO President James O. Heyworth states:

"In our own interest, we want to make our services available to the widest possible number of paying subscribers."

This statement does not comport with reality.

When our members have offered to pay HBO and other program packagers for reception of their signal, we have most often been told that "corporate policy" does not permit the acceptance of such payment. See Appendix.[1] Since when is it wise corporate policy to refuse payment for a service which has already been delivered?

The testimony of Andy Setos, Vice President of Engineering and Marketing for Warner Amex, on H.R. 4727 is even more disturbing. The House was told by Mr. Setos that:

"Where we can legally do so, our company wants to make our program service available to the public cable systems, MDS, master antenna systems, and individual home users."

In that same testimony, Congress was told that:

"If the cable system within their area is either not an affiliate of ours or cannot hook them up in a reasonable amount of time, then we will license them, whether they be an MATV system or whether they be a private earth terminal in the backyard of someone's home, whether it be in the mountains, on a ranch, or in an urban area; but we will license them, as I said, . . . in my testimony."

This statement too does not comport with reality. Four months after that testimony was given, Warner Amex is still refusing backyard users. See Appendix. To our knowledge, Warner Amex has *never* authorized reception of any of its services by backyard satellite earth station owners. While payment was accepted from a few satellite master antenna television systems, we have been told by a Warner Amex representative that no new contracts will be entered into with SMATV operators for any of Warner Amex's services.

While I suggested earlier that SPACE was sensitive to the legitimate concerns of MDS, STV and program suppliers, there are other concerns of the program industry which are not worthy of government concern, let alone protection.

Let us look at some of the facts. Every one of the major subscription suppliers (Home Box Office, Showtime, The Movie Channel) is corporately controlled by one or more of the largest cable television companies. Private earth stations present the *only* near-term competitive source to cable television companies for multiple channels of subscription programming to the home. In other words, the development of the backyard earth station industry is a potential source of competition to cable television. This, we believe, is one very evident reason why the program packagers refuse to deal.

You are told by some supporters of this legislation that it remains the absolute right of the senders of communications to refuse to deal with whomever they wish. We disagree with this conclusion. Anti-competitive refusals to deal are never in the consumers' interest and should not be permitted. Wholly apart from that consideration, satellite technology is a resource which was developed through taxpayer dollars and uses the public spectrum. The program suppliers should not be able to continue to control these resources in a manner that denies service to the taxpaying public.

We urge the Congress to immediately reverse this trend of refusing to deal with the public. Use of the spectrum should be conditioned on the following: What is made available to cable subscribers generally should be made available to those who have their own receiving facilities. For those programs that are subscription in nature, there need not be a free ride; the public should pay. If payment is refused, there should be no penalty. If the sender of a satellite signal does not choose to protect that signal from interception, why should the government enact a law to protect him? If the satellite signal is encoded or scrambled, we believe that the law should protect the sender of that transmission against those who would view it without paying for it, such as the STV companies desire. There is a legitimate purpose for scrambling a subscription signal to ensure payment. There is no legitimate public interest in scrambling widely available entertainment services so as to be able to deny their reception by members of the public willing and able to pay for such services. At least one service, Reuters News, is scrambled and deals with anyone who is willing to pay for the service.

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[1] The appendix has been retained in the committee files.

A POINT OF SALE LICENSE

We have also been told that the "administrative burdens" involved in collection from backyard earth station operators would be enormous. Yet whatever revenues were derived would be more than those obtained under the subscription services' existing policy—i.e., refusing payment. More significantly, we have, on several occasions in the past, offered to compensate for whatever "burdens" were imposed by helping to establish either a "point of sale" licensing payment to the program suppliers or by paying an "ASCAP" type entity the subscription fees of earth station owners. Without exception, these offers have been either rejected or ignored. We have received no alternative offer from either the program packagers or the motion picture companies. Attached to this testimony as an Appendix is a letter to Mr. Jack Valenti, President of the Motion Picture Association of America (MPAA) and MPAA's response. Similar letters were sent to the motion picture companies, HBO, the Movie Channel and Showtime, as well, offering a point of sale payment program—unregulated, without government supervision and based on a royalty payment at the time an earth station is purchased. What is MPAA's answer: That we have misconstrued the purpose and effect of the bill. At the same time MPAA is seeking to impose just such a point of sale fee arrangement on the sellers of videotape and videotape recorders and MPAA is asking that the amount of the fee be established by a government agency.

In his statement in support of H.R. 5705, "The Home Recording Act of 1982," Mr. Valenti points out that a mechanism for payment for home viewing of motion picture material is necessary to protect the creative community as well as: ". . . the many thousands of men and women organized into guilds and unions who are the backbone of the American film industry."

We agree.

We are told by Mr. Valenti that:

"Without a compensation mechanism, creators will have less incentive to create quality films and producers of programs will be far less willing to take financial risks to make innovative programs of excellence."

We agree.

Urging a point of sale license for videotape recorders, Mr. Valenti tells Congress: "We ask nothing more than to be lawfully and justly compensated when our property is taken from us."

We respond: We ask nothing more than to compensate you for viewing your movies which you have already seen fit to transmit to our homes.

The motion picture companies should not have it both ways. They cannot rationally seek to establish a point of sale license in the case of a videotape machine while stonewalling that very same offer in the case of a satellite earth station receiver.

SPACE has not fought against or taken issue with the concept of payment, as the cable industry successfully did for 25 years or the videotape industry is doing now. SPACE has not sought a mandated government rate or a tribunal to regulate rates. SPACE has tried to deal fairly with those who believe that they have some form of proprietary rights. In the process, we have been accused of being "pirates" by some and "boy scouts" by others. It should now be clear to you what our position is. It should also be clear to you who is trying to deprive the American consumer.

Finally, it is no answer that DBS is coming. It is here. The genie is out of the bottle. Thousands of your constituents are enjoying many channels of television for the first time. We urge you to make sure that the future that can happen, will happen.

Senator **Goldwater**. Senator Pressler.

OPENING STATEMENT BY SENATOR PRESSLER

Senator **Pressler**. Thank you very much.

First of all, I want to thank the chairman of this subcommittee for his leadership on this issue. Government policy has not kept pace with technological developments. It is time for this subcommittee to look at the varied and complex changes in the cable industry.

Coming from a rural State, I have a particular interest in cable service. Farming and ranching communities in sparsely populated areas like South Dakota were the first to benefit from cable technology which was used to retransmit traditional broadcasting. However, for technological, economic, and regulatory reasons, the nature of the industry has changed radically in the last decade. In many instances, rural States are now losing out on new choices of service being promised elsewhere.

There are only 55 South Dakota communities out of hundreds which have cable service. Only 20 systems have more than 1,000 subscribers, the largest being under 15,000 and the smallest system with only 137. Obviously, the cable issues affecting my State are somewhat different from those in more populated areas. Cable now has great potential to be more than just another "entertainment" medium. My hope is that all parts of the country can and will participate in the ongoing communications revolution, in which the cable industry plays such an important role.

For this reason, I have a special interest in those provisions of S. 2172 on cable service and cable ownership in rural areas. I understand that the subcommittee is hearing from small cable operators as well as a representative from a rural telephone co-op which offers cable service. I am most interested in this testimony.

I have here a written statement from Mid-Continent Cable Systems which serves communities in South Dakota, North Dakota, and Nebraska. Mr. Joe Floyd, Jr.,vice president of Mid-Continent, is a very knowledgeable businessman whose background gives him a clear understanding of the particular problems facing smaller, rural cable operators. His fine statement outlines some concerns of operators in my region of the country and I would ask that it be included as part of the hearing record.

It seems to me that any satisfactory cable legislation must cover two issues: The nature of the industry and the nature of government regulation. Cable service promises vast and far-reaching new technologies. But this potential is uncertain at least partly because there is no coherent and consistent Government policy.

The members of this subcommittee must meet several goals which occasionally conflict. First, we must establish a consistent Government policy regarding the cable industry in order to provide a stable economic environment for this exciting and promising technology. Second, we must define Government's regulatory responsibility, always remembering the advantages of local regulation wherever possible, and no regulation where marketplace forces are adequate. But the last goal is most important. Any cable legislation passed by this Congress must first and foremost consider the consumer of the service, the viewer of the product. We are not here to protect any industry interest or do battle on behalf of city and State governments. Instead we must determine how best the American public can be served and fashion legislation which will further that public interest. I'm sure that this subcommittee, under the chairman's able leadership, will sort through the conflicting views presented in this week's hearings and establish a fair and reasonable Federal cable policy.

I do have one or two questions for this panel. I would ask permission to submit for the record testimony from a South Dakota cable broadcaster, Joe H. Floyd, Mid-Continent Broadcasting Co.

Senator GOLDWATER. That will be done.

Senator PRESSLER. Also, I might also like to submit written questions to panel I and panel III—I am sorry I had to miss them. I was at another committee meeting—but regarding some of the issues of rural cable and very small towns where cable does not reach, and without going through all of these questions, I would like to say that they are something along the line I have heard from many small towns in my State, which claim that private cable operators do not want to serve rural communities. They may want to wire the town without extending the service to outlying farms and ranches. I want to quote from one letter:

> The cable companies today are like the power companies were 50 years ago. They really do not want to serve the rural areas, but they do not want anyone else to do it either. They want the cream. Just how strong is the cable industry's commitment to serving small towns and rural areas? What alternatives do you suggest for those communities which are not economically attractive to the operator?

These are not questions for this panel.

Now, this panel. Mr. Brown, I have heard from South Dakota retailers and users of Earth stations that there seems to be a growing technology in rural areas where farms and ranches will never be wired for cable. What specific changes would you suggest in section 612(2) in order to provide adequate program compensation while at the same time encouraging a technology with so much potential for sparsely populated areas?

Mr. BROWN. Senator Pressler, I would like to state that the manufacturers of this equipment and the users of this equipment are willing to pay for those programs that are deemed to be pay television programs, such as programs that afford movies on a monthly basis.

My view is the only practicable way to establish that is to have a form of compensation such as the cable industry uses where they pay a certain percentage of their gross revenues into a pool and that is distributed among the producers of the programing. We are also willing to have a royalty placed on the sale of the Earth stations or the peripheral equipment that goes with it in order to compensate.

Now, we think this goes way beyond what is necessary because we do not violate the copyright laws. We do not make a copy. We sit there and view it and it disappears. But we understand that the logical conclusion of not paying for certain kinds of these programs is that if nobody paid for them, there wouldn't be any. So we think it is right and moral that they be paid for.

We would suggest the Congress institute a plan of payment on a royalty basis such as Mr. Valenti is asking for before the Judiciary Committee. I have outlined such an idea in my testimony. I think it is something that should be negotiated, but they have refused to negotiate. And where there is a refusal to deal, I think that is where Congress has to come in and make some rules itself.

Senator PRESSLER. Thank you. I have no further questions.

Thank you, Mr. Chairman.

Senator GOLDWATER. Thank you, Senator.

Ms. Charren, I was particularly glad to have you here today.

Ms. **Charren**. Thank you, Senator.

Senator **Goldwater**. While this does not come under the purview of this legislation, and while I do not aim this criticism at every children's program or every advertisement, I think the stuff we are watching is God-awful. I do not know if we can correct this by legislation, and I do not know if we want to. It probably gets into the first amendment rights.

I was in business a large part of my life and I spent millions of dollars on advertising, and I do not think I have seen an advertisement on television in months that would sell me on anything, particularly Crunchies, Crispies, all that dog food they peddle around the country for human beings to eat.

Now, I think it is going to get so bad that we may have to look into legislation, although I do not want to. I would hope that through the good work of your organization and others, that we can impress upon the man who is spending advertising money that they are literally throwing it out the window. I say that as a person who knows a little bit about advertising.

I have grandchildren of an age that ought to be looking at better programs but there are not any better programs to look at except a very small handful. So please keep up your work and concentrate on getting things better.

Now, I have one question on this bill. If access opportunities are mandated by law, how can cable operators guarantee that cable programing made available on access channels is compatible with local needs and interests?

Ms. **Charren**. I think that they cannot really guarantee that on access channels. I think if you guarantee enough channels, that the community is going to have to make those decisions; the community is going to have to get involved. I think that is part of what Sue Buske is doing with her life, helping the community get involved. I think what I heard from cable companies this morning is old technology talk.

The fact is that until now the public did not know what to do with those cable channels that they had received as a gift, and there were not that many around the country, and they are going to find out, maybe even starting with these hearings. The public is at the very beginning of access to that television screen. I think that when you have franchise agreements like we have in Boston where we have 100 channels and up to 20 reserved out of that 100 for the home for access and 100 institutional channels on 2 institutional loops where 1 of them, 54 channels, is reserved for a nonprofit, Cable Access Corp., presumably to be run for the benefit of the community, you are going to have people popping up out of the woodwork to run these channels.

Ms. **Buske**. One of the things that we have observed over the years is that if people do not know the channel is there, if people do not know the equipment is there, if there is no community facilitation, people are not going to use these channels.

One of the things that we have noticed through the growth of our organization just over the last 2 years is that the public knowledge about the potential for using cable for community purposes has increased drastically. People now, just simply by taking a look at what is happening when cities and cable companies sit down to negotiate, are much more aware of the possibilities and what can be done on access channels.

In fact, if we take a look at some of these systems that have been operating over the years and have had access channels, there have been a couple of reasons why. Those who have had access channels running successfully, there have been several factors. Many times there has been an active community organization which has come forth out of the community and said to the cable operator, we are interested in doing this programing, we want to put our children on, we want our children to learn critical viewing skills by how to use the tools of television, and in those kind of cities, cities like Reading, Pa., for instance, a community group has come forth and has managed the access facilities and provide them for the community.

In other communities they have come forth because some dollars have been made available by the cable operators. But in the past the reason access has happened is because someone got in at some point but not enough people knew about it. Now people are aware of it. The impact of these local channels on your day-to-day life, on your children's, on your grandchildren's day-to-day life can be great.

Your comments regarding what is coming across the tube right now and your concern about that access programing and allowing children to learn how to use the tools of television and in the process to become more critical viewers is going to have an enormous amount of impact on what we have, not only on cable system but what is viewed and what even comes across the broadcast channels in the future. We need an opportunity for this to develop.

These minimum mandated access channels in this bill can be the beginnings with the cities' opportunity to negotiate beyond that based upon the community need. I can provide you at some point in the future with an enormous amount of information about what has happened in specific situations and what has been learned, and I think we can take a valuable lessons from those

Senator **Goldwater**. Well, what you are saying is that the cable or the station or whatever you want to call it has a primary responsibility in developing this access for the public by letting the public know what we are talking about.

Strangely, the television station in my neck of the woods that gets the highest Nielsen rating has to do with scorpion bites and rattlesnake bites and gila monster bites, and he gets a better rating than Bob Hope but only comes on about four times a year. We have a lot of people who don't know what to do if they get bitten. I think that is a good example, and I think you made a good point there.

I had a question for you. Should Federal law set access minimums or ceilings or both on access requirements?

Ms. **Buske**. I personally believe that it would be healthy to have a Federal minimum access requirement. One of the things that I point out in my testimony was the need to focus on the minimum issue, allowing the cities and localities to negotiate whatever is needed for that specific community beyond the minimum provided by the Federal Government.

Mr. **Jacobs**. I would agree with that. I would like to put somewhat in perspective the remark made on the earlier panel by Mr. Gilliland about the San Jose system and its having only 4 or 5 hours a day of community programing. I would say that is probably a good deal more than the average over-the-air broadcast station. Most local broadcast stations program mostly network or syndicated programing. And much less than 4 or 5 times a day of original, local programs. Four or 5 hours a day adds up to thousands in a year, and I think that probably says a great deal for San Jose. In the same way C-SPAN may get 1 to 2 percent of its audience, but in the aggregate that amounts to a great deal of public information about what is happening in Congress.

I think again it is a matter of perspective. While access may not seem that important to cable operators, to a great number of people in the community who are concerned about that community it can be of tremendous importance.

Ms. **Charren**. I agree that it should be a minimum. I think it frees the community to be creative in looking for more channels, if that seems appropriate, and in how those channels should be used. There is a community in Sun Prairie, Wis. that has mandated a channel for use by children, Kids 4. They are doing all that learning about what television means by making television, and it is a real community resource.

Senator **Goldwater**. Do you have any comments, Mr. Brown?

Mr. **Brown**. I am hearing all this about access. I think the problem that the rural subscriber has is the same one I think Congressman Rose alluded to this morning with respect to spectrum scarcity. We have a number of parking slots in orbit. There are only going to be so many satellites and there are only going to be so many transponders and there needs to be access to that communication by the American public.

I think the same cable companies that are holding access down, in some respects, as we are hearing comment at the table about right now, are the same companies that are denying the access to the American public for the direct satellite system that is here today.

Senator **Goldwater**. I have a question for you, Mr. Brown. Do you think that satellite programing ought to be freely available to anyone with a backyard parabolic antenna or dish, whatever you want to call it?

Mr. **Brown**. My view is that if the cable companies or the motion picture companies that produce the movie channels, which they usually get paid for by the cable operators, if they want to get paid for it, then I think the American public ought to pay for it. If not, they should just leave us alone. Something could be worked out, I think, on who should pay. Saying, for example, that we have to pay a part of the gross costs of our equipment over to these people to compensate them. If they don't want to be paid for it, then we should not be going to jail for watching it.

Senator **Goldwater**. I wonder what is going to happen if Comsat is able to live up to their expectations of being on the air within 2 years with a 2-foot dish at $200.

Mr. **Brown**. I think it is great. I think it is this industry that is going to be able to provide this. We have the DBS system now. It is at a different frequency. It is similar to VHF and UHF. Weather it is the 4 or 12 gigahertz, it is really the same thing. My understanding is they will scramble their signal but they will not deny access to the American consumer. Deniai of access is what is being attempted here by virtue of this bill, and what I suggest ought to happen, and what I suggest if you want to be able to watch all those channels freely—is to make sure that this bill does not pass in its present form—section 705, anyway.

Senator **Goldwater**. I think we have heard some very fine testimony today. I think what we have been hearing only shows what a tremendous precipice we are on. I believe that people who are making all kinds of noises about using old movie films and old material might have to start living in a different age.

Now, I know that residuals, for example, paid to movie actors on films they made years ago, they do not run forever. That man that owns the film thinks he should be paid for it, but the actor does not get a bite of it. I hope we can get those matters straightened out as we get the technical and electronic end of it straightened out because I can see this thing expanding so fast that what we write as legislation if we get legislation written this year will be out of date next year.

I want to thank you for being here. You have provided very good testimony for all of us, and tomorrow if you want some real high class entertainment, we are going to have testimony on blackouts, baseball, basketball, football, hockey, $1 million a year, so come in and hear it.

The meeting is adjourned.

[Whereupon, at 12:25 p.m. the hearing was recessed, to reconvene at 10 a.m. the following day, Wednesday, April 28, 1982.]

CABLE TELEVISION REGULATION

WEDNESDAY, APRIL 28, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 235, Russell Senate Office Building, Hon. Barry Goldwater (chairman of the subcommittee) presiding.

Senator GOLDWATER. The meeting will come to order.

This morning for our first panel we have Mr. Trygveve Myhren, chairman and chief executive officer of the American Television & Communications Corp.; the Hon. Cathy Reynolds, council member, city of Denver; Mr. Stanley Besen, senior economist, The Rand Corp.; Mr. Vincent Wasilewski, president of the National Association of Broadcasters; and Hon. Mildred Schwab, city commissioner, city of Portland. We will go in that order, although we don't have the name tags in front of you. Mr. Myhren, you may start off.

I might explain these lights up here. We are supposed to have a 5-minute rule, and if your testimony will exceed that, we will put the entire testimony in the record. We don't have a lot of time and we want to get as much done as we can. If the green light is on you are good, if the yellow light goes on you want to watch out and if the red light comes on I am supposed to stop you, but I can't see very good and sometimes it runs over.

So, Mr. Myhren, you may start.

STATEMENTS OF TRYGVE E. MYHREN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, AMERICAN TELEVISION & COMMUNICATIONS CORP.; HON. CATHY REYNOLDS, COUNCIL MEMBER, CITY OF DENVER: STANLEY M. BESEN, SENIOR ECONOMIST, THE RAND CORP.; VINCENT WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS; AND HON. MILDRED A. SCHWAB, CITY COMMISSIONER, CITY OF PORTLAND

Mr. MYHREN. Good morning, Mr. Chairman, and members of the subcommittee. My name is Trygve Myhren. I am chairman and CEO of American Television and Communications Corp., a subsidiary of Time. This morning I will summarize major points of my submitted testimony.

I appreciate the opportunity to testify today and applaud your effort to formulate a rational, deregulatory and procompetitive cable policy.

I will concentrate on four issues.

First, regulatory jurisdiction. In recent years our industry has evolved into a national satellite connected telecommunications medium delivering diverse video and nonvideo programing and services. Cable has not yet exhausted its potential.

Yet, the absence of a Federal statutory basis for cable regulation has resulted in ad hoc, inconsistent and costly regulation of cable by the FCC, the States, and municipalities.

To correct this there are two concepts which must be embodied in Federal legislation.

First, the rational allocation of Federal regulatory authority, including reasonable constraints on excessive and unjust efforts by municipalities to tax and retard our business.

Second, clarification of the legal and regultory status of cable. Cable must be allowed to evolve naturally driven by the needs and desires of consumers rather than artificial Government regulation.

Cable's identity should embody the following essential elements.

First, cable is a competitive service. Cable is clearly not a monopoly. None of the services provided by cable are without substitutes. Existing and fast-growing services such as over-the-air subscription television, multipoint distribution services, over-the-air broadcasting, satellite fed master antenna systems, cassettes and disks and movie theaters and such proposed services as low-power television and direct broadcast satellite are all offering very competitive services to cable.

When I talk about these other services, I am not talking about small players. These new delivery vehicles are the pathways targeted by the three major TV networks and others as their entry into pay television.

To quote from a headline on page 23 of ABC's 1981 annual report: "There weren't many electronic pathways to the consumer. Now there are almost too many to count."

A further competitive phenomenon is overbuilding and side-by-side competition among cable systems which is growing very fast.

Another element in cable's identity is recognition that it is not an essential service. None of cable's competitors, except the telephone companies, are regulated as essential. Broadcasters have never been. Consumers have clearly stated that cable is nonessential. In most markets fewer than half of the homes subscribe. With so many homes, and more than half choosing not to subscribe, how can cable possibly be considered essential.

Next, of course, cable is not a common carrier. It is an entertainment and information provider News, public affairs and entertainment programing is both originated and selected from many nonbroadcast sources. Our business requires a great deal of editorial discretion and it requires control over content.

In order to define the necessary cable identity, which I have described above, Congress must take a strong preemptory stand. If excessive regulatory authority is left to State and municipal governments, we will have diverse, conflicting and incompatible policies, as we have now, and more will result.

I am not arguing that State and municipal authorities have no oversight role. Municipalities should have the right and the duty to protect the health and safety of citizens during construction, the ability to insure compliance with easements and define power to deal with cable operators who fail to live up to their franchise agreements.

I also recognize that municipalities have very real economic problems. I am simply saying that the bill should clearly delinerate those areas which are appropriate for State and municipal regulation and it should preempt all other areas.

Now, in addition to the general jurisdictional issue, the bill's failure to address refranchising concerns me greatly. The refranchised process has become complex, lengthy, and costly. It benefits no one, least of all the consumers. It is one of the most disturbing examples of a low-producitivity exercise available in today's economy.

The refranchised situation can only be corrected by a federally mandated renewal expectancy for cable television systems. This approach is not without precedence. There is a clear expectancy for broadcast licensees. Likewise, cable operators who meet their franchise commitments and agree to upgrade their systems should be entitled to renewal.

Now I would also like to address the subject of competitive parity and suggest an entertainment tax for all subscription television service. We must approach the legislative process with a firm grip on economic realities. Cable is not a golden goose, though some would have you believe that. We confront today 18 percent financing, skyrocketing construction costs, local demands for more complex systems, and the threat of local refranchising decisions which are based purely on politics without regard to prior performance and which have the effect of stripping the value from our assets. All of this is in the face of less expensive technologies which are not saddled with franchise fees and requirements to build numerous community studios, finance community projects, and build unproductive channel capacity.

The city's desire to get additional revenue must be tempered with economic reality. If a municipality is looking for additional sources of general revenue, let it impose the same burden that it imposes on cable in the form of a new entertainment tax on all of the competitors. The tax should apply to MDS, STV, SMATV, video and cassettes, theaters and DBS. Such a tax would right the unbalanced marketplace which today creates unfair advantages for cable's competitors who have no such burdens.

Finally, the concept of competitive parity for cable television raises another issue not directly addressed in S. 2172, the first amendment rights of cable. We support Senator Packwood's recent call for broader, more consistent media first amendment rights. In fact, Time and ATC have decided to undertake a comprehensive analysis of the first amendment rights of cable systems which we hope will assist the Congress in resolving a range of public policy questions associated with our industry.

In conclusion, Mr. Chairman, we commend you for your efforts and those of others on the committee and stand ready to assist the committee and its staff in any way possible.

Thank you.

[The statement follows:]

STATEMENT OF TRYGVE MYHREN CHAIRMAN, AMERICAN TELEVISION & COMMUNICATIONS CORP.

I. INTRODUCTION

Good morning, Mr. Chairman and members of the Subcommittee. My name is Trygve Myhren. I am Chairman and Chief Executive Officer of the American Television and Communications Corp., a subsidary of Time Inc. ATC today operates more than 124 cable systems serving almost 2 million homes. We provide cable service in large and small communities in 33 states across the Nation.

I appreciate the opportunity to testify today and applaud the subcommittee's substantial effort to formulate a rationale cable telecommunications policy. The bill before the subcommittee has been provoked by a substantial and continuing controversy concerning the respective roles of government (Federal, State and local) and the marketplace in the future development of the cable television industry. We concur with the deregulatory, procompetitive principles found in S. 2172, and believe that market forces are generally adequate to assure consumer welfare and that, where they are not, specific narrow regulations tailored to remedy specific market deficiencies are preferable to the imposition of blanket regulatory schemes. We strongly support your approach.

In recent years, our industry has undergone a major transformation from a system for retransmitting broadcast signals to communities poorly situated for over-the-air reception, to a national, satellite-linked telecommunications medium, delivering diverse video and nonvideo programming and information services. Cable has not yet exhausted its potential. To the contrary, the seemingly endless flow of announcements of new program packages, the introduction insome cable systems—such as our own Manhattan system—of high speed data offerings in competition with local telephone companies, and the development of truly innovative services such as teletext suggest we may have only scratched the surface. The gravest threat to continued growth and innovation of our industry is excessive regulation.

Despite cable's presence on the Amreican scene for more than three decades, the regulation of cable in many significant policy areas remains unsettled. While the trend toward deregulation is certainly clear at the Federal level and in a few States, the contrary is true at the municipal level of government. In the absence of a comprehensive congressional policy, cable has been subjected to ad hoc, inconsistent regulation by the FCC, States and municipalities, the direction and purposes of which have changed again and again without regard to economic rhyme or reasons.

The ultimate purpose of this legislative process should be to determine what mix of competitive market forces and government regulation, particularly at the municipal level, will best assure that the social and economic benefits of cable technology are brought to consumers, undiminished by unwarranted regulatory barriers. You now have the opportunity to resolve the conflict over the regulatory status of cable, and in so doing, remove a substantial obstacle which I believe represents a fundamental threat to the future of our industry.

What should the framework for S. 2172 look like? I will address this on two levels. First, the fundamental principles which should underlie the bill, and second, some specific comments on S. 2172.

II. ESSENTIAL FUNDAMENTAL PRINCIPLES

I believe there are two fundamental concepts which must be embodied in Federal legislation. First, a national allocation of regulatory authority among Federal, State and municipal governments, including reasonable constraints on excessive and unjust efforts by municipalities to tax and retard our business, and second, clarification of the legal and regulatory status of cable television service.

It is important to discuss the nature of cable service first, because that will help settle the jurisdictional question. As noted, cable television has come into its own. It is no longer an adjunct to broadcasting. In fact, retransmission of broadcast signals now comprises only a small portion of the larger cable system offering. It has been estimated that cable television is received in over 25 percent of homes in this country and that by the end of the century cable subscribership will have risen to 45 percent.

We now need to establish an identity for cable television which will allow a natural evolution of the industry, driven by market stimuli—the needs and desires of consumers—rather than artificial government regulations.

That identity should embody the following essential elements:

Cable television is a competitive service, not a monopoly. None of the services provided by cable television are without substitutes. Existing and fast growing services such as subscription television, multipoint distribution service, over-the-air broadcasting, satellite-fed master antenna systems, video cassettes and discs, movie theaters, and proposed services, such as low power television, and direct broadcast satellites (both mid- and high-power), all offer competitive services. Under traditional antitrust theory, the existence of so many substitutable services belies the argument that cable is a monopoly. The FCC has repeatedly echoed this viewpoint in numerous recent inquiries in which it has characterized the video market as "workably competitive." A casual perusal of the communications trade press supports the view that significant and escalating video competition is here today.

A recent analysis entitled "The Impact of Competitive Distribution Technologies on Cable Television" prepared by Brown, Bortz, & Coddington (BBC) soundly rebuts the argument that cable is a monoply service. The BBC study concluded that "subscription television has been able to attract a relatively large number of subscribers, even in areas where cable television is available."

Moreover, the advent of multichannel capability for these technologies dramatically increases the competitive effect. BBC found that a large portions of consumer demand for nonbroadcast services can be satisfied by a four- or five-channel service, suggesting that multi-channel STV, MDS, SMATV, or DBS "can capture a significant market share" and provide "serious competition to cable television." With this type of direct and strong competitive challenge, cable simply cannot be classified as a monopoly service.

Even if it is argued that cable service has one characteristic of a natural monopoly, i.e., it is the only multiple channel operator in most franchise areas, the economic opportunities for overbuilding and side-by-side competition are growing. We now see overlapping service areas and even multiple cable companies serving the same community. In the 30 years prior to 1978, only 24 overbuild situations occurred. However, since that time it has become economically feasible to wire major urban markets. In the past three years alone, there have been at least 58 instances where more than one cable system has operated or is attempting to operate in a single city. Cable competition in these areas has ranged from partial overbuilds to complete overbuilds such as Allentown, Pa., where 1 cable system has 35 channels and 50,000 basic subscribers and another has 36 channels and 55,000 basic subscribers. Further, multichannel STV, SMATV, DBS, and MDS, such as Microband's recently proposed five-channel MDS system, remove cable's advantage as the only multiple channel delivery system.

The notion that a cable system is a monopoly simply because it is the only cable operator in a city defies logic. Under the theory, the Washington Bullets would be a monopoly because they are the only professional basketball team in Washington, D.C. Such a position is clearly absurd. The basketball team competes with soccer, baseball, football and other forms of entertainment. The same is true with cable—competition comes from a variety of sources which provide close, substitutable services.

And, it is important to keep in mind that government regulation is in many cases the most important factor contributing to the appearance of a monopoly. The franchise process is an enormous entry barrier that has limited the ability of would-be competitors to provide service. A congressionally mandated procompetitive, open entry policy, coupled with parity of treatment for cable and its competitors, will further enhance the already expansive competition in the video and information markets.

Cable television is not an essential service. Neither the FCC nor any court has ever found cable to be an "essential service." None of cable's competitors (except telephone companies) are regulated as "essential." In fact, in the long history of broadcasting, including those periods when it was clearly the predominant, if not only available video service, its regualtion was not predicated on "essentiality." Even if video service were considered essential—a questionable conclusion which has garnered no support among regulators—a single video service, facing so many competitive alternatives, could not be considered essential. Would a "competitive" market tolerate classification of cable as essential, but subscription television, which provides the same product, as nonessential? There is an even more persuasive argument—consumers have clearly stated that cable is nonessential. Nationwide, about 50 percent of the homes passed by cable subscribe to the service. In many markets, including virtually all major urban markets, fewer than 40 percent of homes passed by cable subecribe. How can a local government characterize cable as "essential" when so many homes passed have voluntarily chosen not to subscribe to the service? Misuse of the concept of "essentiality" may be just another municipal excuse for excessive regulation of cable television.

We recognize, of course, that in certain markets which do not have readily available programming alternatives such as over-the-air television, consumers depend more heavily on cable television services. In these areas, initial regulation of basic services may be appropriate. This was the approach of the cable provisions which were ultimately deleted from S. 898. In all other areas, however, competition, not regulation, should govern the competitive provision of basic and other video and information services.

Cable television is not a common carrier, public utility service. Cable television is an entertainment and information provider. Program origination is a fundamental element of the business. In addition, news, public affairs, and entertainment programming is available from a variety of nonbroadcast sources, including national cable networks. We provide locally originated programs as well, ranging from city council meetings to local theatrical performances. And, we make information services available in an "electronic print" format. Our business requires a great deal of editorial discretion and control over the content of information provided. Cable cannot be narrowly classified as a common carrier—we do far more than provide the communications pipeline for others to transmit information of their own choosing. Moreover, the two factors which traditionally trigger common carrier regulation are essential service and monopoly power. The cable industry is characterized by neither.

Although the general scheme of S. 2172 clearly indicates that cable television is not a common carrier service, there is no explicit statement to that effect. The concern over common carrier status is not theoretical and cannot be overstated. Several States and municipalities are attempting to impose common carrier status on cable systems. The starkest example is California Assembly Bill 2472, which would drastically regulate cable as a public utility and completely separate facilities from programming. Failure to clearly preempt this type of regulation would circumvent the Committee's goal of a national and uniform policy for cable television.

Once cable's identity has been established, the need for detailed regulation, particularly emanating from three levels of government, fades. A deregulatory framework, allowing open entry by all competitors, shifts the future of the cable industry from regulatory bodies and courts to the marketplace. In order to accomplish this, however, Congress must take a strong preemptory stand. This is required because the awarding and administration of cable television franchises by municipal authorit[illegible] is a severe form of economic regulation. Those who dispute this, suggesting that cable is deregulated at the local level, simply do not understand the fundamental dynamics of this process and the unbridled power to coerce which franchise awarding and administration puts in the hands of local authorities. Jurisdiction is a cornerstone of any Federal legislation. Federal, State, and municipal boundaries must be clearly marked. Otherwise, inconsistent, excessive and anti-competitive regulation will evolve and the goal of a national cable policy will not be realized.

The need for strong Federal preemption flows naturally from two findings, both of which the committee embraced in sections 601 and 602 of S. 2172. First, cable is a national, interstate, satellite-connected communications medium. Second, a national policy is needed for this industry.

It is a fact that jurisdictions at three different levels of government are driven by widely divergent perceptions, judgments and objectives. It cannot be disputed tha[illegible]f excessive regulatory authority is left to State and municipal governments, diverse, conflicting, incompatible policies will result.

There are several State and local bills now pending which would classify cable as a fully separated common carrier. The California bill I referred to a moment ago is one example. On the other hand, some States and local authorities, such as Massachusetts and New York, have established and are proposing healthy deregulation for cable. How can these bipolar views by accommodated in a national cable policy? The answer is clear—they cannot.

S. 2172 attempts to accomplish preemption by reserving for the Federal Government all matters referred to in the bill. While we agree with the generally preemptory approach, we believe there are some very important problems with the specifics. First, the provision is unclear. It does not precisely apportion authority, does not distinguish between general and subject matter jurisdiction, and leaves to the states an unspecified sphere of regulation "not inconsistent with the exclusive grants of authority in the bill." I am not sure what this phrase means or what areas it leaves for local regulation.

Second, some very significant issues are left out of the bill and clearly would be targets of local regulation. Among these are franchising and refranchising guidelines, enhanced services such as teletext, municipal antitrust immunity, pole attachments, and content regulation other than equal time and the fairness doctrine.

Local regulation in these areas would upset the delicate balance of Federal, State and municipal regulation and render the national telecommunications policy absolutely meaningless. Finally, the possibility of residual State and municipal regulation is a time bomb which could severely inhibit the growth of future services and technologies. The present Communications Act has governed the industry for 50 years. Assume for a moment that S. 2172, if enacted, would remain intact for half that time. That takes us to about the year 2010. Under the preemptory scheme contemplated in S. 2172 any novel service or technology developed between now and then would be subject to unbounded State and municipal regulation simply by virtue of its novelty. Obviously, this creates a tremendous disincentive to growth and innovation. I urge the committee to take a forward looking approach to the jurisdictional issue.

I am not arguing that State and municipal authorities have no role in overseeing the provision of cable television service. I am simply saying that their role should be specificed in a positive, rather than negative, manner. The bill should delineate those areas which are appropriate for State and municipal regulation and preempt all others.

What areas are appropriate for State and municipal regulation? Local authorities have traditionally raised three bases for regulation: Cable is a monopoly, cable is an essential service, and cable occupies a municipal "right of way." The monopoly and essentiality arguments, which I addressed above, are clearly not legitimate grounds for regulation. However, granting a right of way to a cable operator may confer certain powers on local governments. These powers which constitute the specific area Congress should delineate as appropriate for State and local regulation, should be linked directly to the right of way. Local authorities should be able to enact regulations related to the health and safety of its citizens during initial construction, operation, and any remodeling or updating of the cable system. Likewise, local authorities should be able to ensure compliance with applicable easement terms. Local authorities should be given some defined power to deal with cable operators who fail to live up to their obligations under the franchise. Finally, local governments should receive reasonable compensation for the cable companies' use of public streets and rights of way.

A key question is at what level should the cities be compensated for the right of way.

Above all else, one must approach this issue with a firm grip on the economic realities of the cable television business. Cable is not a "golden goose." The industry does not, as some would lead you to believe, have a license to coin money. To the contrary, today we confront 18 percent financing, skyrocketing construction costs, local demands for more complex and costly systems, the threat of local refranchising decisions based solely on politics without regard to prior performance, and escalating competition from a host of less expensive video and other technologies which are not saddled with franchise fees, requirements to build numerous community studios, finance community affairs projects, and build unnecessary and unproductive channel capacity.

The reality is that today cable is at some disadvantage with respect to its competitors. Look at the real cost of delivering video services to the subscriber. For subscription television the cost is approximately $200 per subscriber. Multi-channel MDS costs are about $350 per subscriber. Cable is up to $1,000 per subscriber. Current franchise fee requirements, which are paid by none of our competitors, add $125 to our cost per subscriber. That is an economic reality which should be easily understood, but sadly is not at the municipal level.

The subcommittee should also understand that many of the cities' demands for increased payments from the cable industry are predicated upon the rapid development of enhanced services such as teletext. Although we believe these services will evolve and we are committed to developing them, there has as yet been no demonstrated market demand for these services. Further, it is highly likely that when there is demand, we will face stiff competition in the provision of these services from the telephone industry.

In short, the cities' desire to maximize the revenue from its granting of a right of way must be tempered by the economic realities of the cable business. Cities should not, and cannot, look upon the cable industry as a source of revenue to subsidize the costs of local government. A 5 percent income tax. Compensation for the right of way should be limited to the reasonable value of the right of way and the cost of regulating the cable system.

If a municipality looking for additional sources of general revenue to finance the costs of local government wishes to impose additional taxes on cable, let it impose the same revenue burden in the form of a new entertainment tax on all subscription television services within its jurisdiction. Let such a tax apply equally to cable, MDS, STV, SMATV, video cassettes, and theaters. We would seriously consider supporting such an across-the-board tax, designed to raise municipal revenues, but not to skew the marketplace by creating unfair advatages for cable's competitors who presently escape any special revenue burdens.

The idea of regulatory parity for cable television raises another serious matter which is not directly addressed in S. 2172—the First Amendment rights of cable television. Federal, State and local regulators have not kept pace with the rapid growth and changing nature of the cable television industry. This is particularly true in the area of the First Amendment. Time Inc. and ATC have decided to undertake a comprehensive analysis of the constitutional rights of cable systems. I am hopeful that our far-reaching study will assist the Congress in resolving a range of public policy questions associated with our industry.

As I noted, cable television has made the transition from a purely retransmission medium to a program and information editor. We increasingly originate our own information and entertainment programming and select from an expanding number of news, public affiars, and entertainment offerings provided by others. Field trials of our new teletext project will begin in Orlando, Florida, and San Diego, California, in the fall and will involve a very substantial editorial function. In addition, cable publishing projects are scheduled for Champaign and Urbana, Illinois; Mayfield and Murray, Kentucky; and Eau Claire, Wisconsin. This has changed our role. Now we are functioning essentially as a newspaper or magazine editor, developing and purchasing news and entertainment features from national and local sources.

Moreover, the traditional rationale for regulating cable does not support a diminution of First Amendment rights. Even if the "essentiality" argument were valid, and we have demonstrated that it is not, it applies with no greater force to cable television than to newspapers. The same can be said of the monopoly argument for regulation. A single cable operator in a particular market is indistinguishable from the one-newspaper town. If we look at the total video and information market, the monopoly argument is even weaker.

Although cable uses a municipal "right of way," clearly this "right of way" is not a basis for breaking down the First Amendment. Local franchising forces cable operators to give up free speech rights as a condition of obtaining the franchise. The Supreme Court has uniformly held that bargaining away free speech rights as a condition of gaining Government privileges is intolerable under the First Amendment.

Neither Congress, the FCC, nor the courts have addressed the First Amendment implications of cable television in a comprehensive manner. Our comprehensive, cable First Amendment study is a major first step in this process which we are firmly convinced will settle the First Amendment status of cable television.

III. SPECIFIC ASPECTS OF S. 2172

I will now move to some specific aspects of S. 2172. While we support the deregulatory thrust of the bill and the attempt to establish a clear Federal identity for the cable industry, several aspects of the bill are troublesome.

Most importantly, we must assume that the subcommittee intended that the provisions of S. 2172 could not be bargained away or subject to change during the franchise process. Otherwise, franchise authorities would be able to hold a gun to our head and force us to accept changes in our basic rights as a prerequisite to obtaining a franchise. This would obviously undermine the entire scheme of S. 2172. A good example of this problem is found in section 604(1) which defines "basic service" as the "retransmission of broadcast signals and any other service determined by a cable operator." States and municipalities, with their leverage over competing franchise applicants, may attempt to extend their regulatory powers by pressuring franchise applicants to enlarge their definition of basic services to include pay services. We favor the definition of "basic services" which this committee last year wrote into S. 898. "Basic services" should include retransmission of broadcast signals and program originations provided for a basic monthly fee. Also, the cable operator should be able to expand basic services, but such explanation should be at his total discretion and should not be part of the franchise agreement.

The commercial channel access provision of section 606 also concerns us and we do not understand the rationale for such a provision. It is our business to increase subscriber penetration by designing the most desirable total package program. It is, therefore, in our own economic interest to carry the best programming available. In fact, that is exactly what we do. Furthermore, there is no need for a comprehensive scheme of government intrusion to guarantee commercial or public and governmental access, since there is no evidence of an industrywide practice of refusing to provide such access on a voluntary basis. To my knowledge, there has been no comprehensive demonstration of a pattern of denying access in the cable industry.

Moreover, there has been no demonstration of demand sufficient to justify the 20 percent set aside required in section 606. Access channels go largely unused in many cable systems despite some cable operators' attempts, at considerable cost, to promote their use to groups, individual citizens, and the community at large. In connection with the FCC's 1972 mandatory access rules, for example, we spent over $100,000 promoting access channel availability on our Reading, Pennsylvania and Orlando, Florida systems and still the channels were not used. Absent a clear pattern of denying access and a demonstration of unsatisfied demand, mandated channel access is inappropriate, particularly since, should demand for and denial of access occur in the future, the antitrust laws are a sufficient policing mechanism.

The sunset provision on section 606(b), which removes the channel access requirements if the FCC finds that there are reasonably available access alternatives in a particular market, should be amended in two ways. First, the FCC should focus on availability of alternative delivery systems, rather than alternatives for access. This would fully satisfy diversity concerns which underlie section 606. Second, the provision should be reversed, so that the channel access requirements apply only if the FCC affirmatively finds that there are insufficient alternative delivery systems in a particular market. This change would more realistically reflect the increasing competitive nature of the video and information markets.

The subcommittee should also keep firmly in mind the amount of channels a cable operator is required to forfeit under S. 2172. In addition to the 20 percent under section 606, the "must carry" rules and technical limitations reduce cable operators' channel capacity. In metroplolitan areas, it is not unusual for a cable operator to be required to carry over a dozen television signals. In Los Angeles, for example, there are 17 "must carry" stations. And technical difficulties related to co-channel interference, trapping, and aeronautical frequency preemption, which can be corrected in some cable systems, may account for up to 14 additional channels on other systems. The "must carry" rules and technical limitations, in conjunction with the channel leasing requirements under section 606 remove too much capacity from a cable operator's control and hamper our ability to design a cable package which satisfies the needs and desires of subscribers.

Finally, the notion that municipalities could engage in pay programming under either section 606(a)(1) or (a)(2) is particularly disconcerting. Under these provisions, municipal governments would directly control media content. Aside from the obvious First Amendment strains, this raises the competitive anomaly of a municipality competing directly with an entity which it regulates. Allowing municipalities, with their leverage over cable operators on renewal, to "compete" with cable operators in the pay programming market is clearly no "fair competition" and is clearly not a proper exercise of government power.

Section 605 of the bill would allow municipalities to own cable systems. Government ownership of cable systems raises serious First Amendment concerns and traverses the fundamental constitutional principle that Government should be excluded to the maximum extent possible from all media services. Further, this provision has implications beyond cable television. By adopting the principle that it is appropriate for government entities to own the media, S. 2172 may open the door for government ownership of other media, such as newspapers and broadcast stations.

Section 605 also provides that municipalities may only acquire cable systems at "fair market value." While fair market value is preferable to book value, it is unclear who determines fair market value and how that figure is arrived at. It is absolutely crucial that fair market value include present, ongoing business value of the system and good will. Who should decide cases where a cable operator and the city cannot agree on "fair market value"? If municipal ownership is authorized, should cities be prohibited from using tax exempt bond financing to buy systems? Significant clarification is necessary in this area.

The bill does not provide any guidance in the critically important franchising and refranchising area, and this is an omission that concerns me greatly. The cable franchise process has become inordinately complex, lengthy, and costly. This benefits neither the cable industry, municipalities, nor consumers. It is one of the most disturbing examples of a low productivity exercise available in today's economy. The large amount of money devoted to this effort should be channeled to more productive areas such as developing services which better serve the needs and desires of our subscribers.

The current situation is intolerable and can only be prevented by a federally mandated renewal expectancy for cable television systems. This approach is not without precedent. There is increasing recognition of a renewal expectancy for broadcast licensees. The courts have recognized that some level of renewal expectancy is implicit in the Communications Act and the FCC has instituted a rulemaking proceeding to more clearly articulate the concept. On several occasions, Congress has attempted to establish a renewal expectancy for broadcast licensees, recognizing that absent greater certainty, licensees will seek to maximize immediate profits and will eschew investment and development.

Absence of rationality in the renewal process can be expected to have similar effects on cable systems. If a franchisee has no expectation of renewal, it may attempt to maximize current operations, thus minimizing investment in new systems and delaying conversion of older systems to new technologies which provide greater channel capacity and two-way capability. Given the large capital requirements needed to construct new systems or upgrade existing operations, the disincentive to investment will likely be even greater in the absence of a renewal expectancy for cable than it is with broadcasters.

To avoid these problems, S. 2172 should contain an expectancy of renewal for cable systems which meet their franchise commitments and agree to update their system where necessary. To defeat the renewal expectancy, a municipality would have to demonstrate that the cable operator had not met the criteria for renewal. Cable operators could sue for injunctive relief in federal district court and the burden would be on the municipality to demonstrate that the cable operator was unfit to operate a system in the municipality.

I understand that the intent in S. 2172 is to deregulate and preempt pay rate regulation. We strongly support this effort. The recent growth of the cable industry is traceable in large measure to the success of pay television. In turn, the success of pay television is attributable to deregulatory initiatives which occurred in the 1970's. Not too long ago, cable operators could choose from only one or two pay services. Now several pay services are available and the list is growing daily. Regulation can only reverse this trend. It would indeed be anomalous to now argue that the clamps should be placed on the pay television industry by reinstituting at the municipal level the type of federal regulation which for so long stunted the industry's growth.

Further, rate regulation is simply unnecessary in competitive markets such as this. I need not recount again the vast and expanding number of competitors in the pay television field. Competition achieves the goals of rate regulation—lower costs and therefore greater availability of service to consumers—without the disincentives to growth and innovation which are a natural consequence to such regulation. However, S. 2172 does not explicitly preempt pay rate regulation. I believe this is an unintended oversight, but it is obviously of great concern. Failure to specifically preempt pay rate regulation would radically alter the nature of the bill, reverse the current unregulated status of pay rates, and create a whole new and destructive layer of State and municipal regulation. Satellite-delivered pay programming is an integral facet of the national, interstate character of cable television. The subcommittee would be remiss if it did not preempt and deregulate this critical area. I urge the committee to add a new subsection (d) to section 607 which specifically preempts regulation of pay cable rates, and enhanced service fees as well.

The bill would authorize the FCC to set franchise fees. I believe the bill should itself authorize the fee only at a level necessary to recapture reasonable costs of regulation and which would not allow franchise fees to put cable at a competitive disadvantage with its significant and growing competitors. The fee should take into account the value of all concessions which the operator grants the city, including value of public access channels.

I also urge the committee to include in this legislation an extension of the current cable pole attachment law past the February 1983 expiration date. I need not recite anew the long history of abusive and anticompetitive practices which the cable industry encountered in its dealings with the telephone industry, and which moved Congress to enact the 1976 law. Extension of that law is critical to our continued growth and economic well-being.

IV. CONCLUSION

My testimony today is not designed to be critical of municipal officials. "Finger-pointing" is not what is needed now; nor will it change the underlying economics or the sharply increased competitive climate for cable television. What is needed is for public officials, cable operators, and others to approach this bill and the issues raised in it with an open mind. Several provisions must be clarified before we can move toward a total and final judgment, but the bill does represent an excellent starting point. We strongly support many of its provisions, including a Federal ceiling on franchise fees, pay rate preemption and deregulation, prohibition on cable ownership by the Bell Operating Companies in their own distribution areas, and the generally deregulatory and federal preemptory thrust of the bill.

We commend you for your efforts and stand ready to assist the committee and its staff in any way possible in the legislative process.

Senator GOLDWATER. Thank you very much. You have raised some very interesting points there that the staff will be probably calling you for more help on.

Now we have Hon. Cathy Reynolds from the city of Denver.

Ms. REYNOLDS. Thank you very much.

Mr. Chairman, I am Cathy Reynolds. I am a council member from the city and county of Denver, Colo., and I am chairperson of the National League of Cities' Steering Committee on Community and Economic Development. We do very much appreciate the opportunity to be here this morning to speak to this very far reaching legislation.

We commend you, Senator, for beginning a long-awaited congressional debate on national cable policy. We believe that this bill, the Cable Telecommunications Act of 1982, S. 2172, which recognizes the need for diversity of information and local control, is an excellent starting point for congressional consideration of cable policy.

We urge you to treat the following objectives as key goals of cable legislation.

First, promoting a diversity of information; second, allowing for local determination of public telecommunications facilities; and third, promoting competition.

We are in accord with the general purpose of the bill that appropriate jurisdictional authority should be defined. However, we believe that if these policy objectives are to be fully achieved, the bill should be modified in certain respects.

Our long experience in this area convinces us that the interests of Federal Government and local governments are both definable and distinguishable.

Clearly identifiable local interests include:

Assuring through the competitive franchise process the ability of cable systems to meet local communication needs; assuring the introduction of constantly improving telecommunications infrastructure; and maintaining a flexible and adaptable regulatory framework that is responsive to local communications needs.

We believe the local franchising process has been and is the most effective mechanism available.

The interests of the Federal Government are not as readily identifiable as those of local governments. They do clearly include:

Insuring diversity of information; establishing a national ownership policy; and clarifying the jurisdictional framework for the regulation of cable.

S. 2172 is a good starting point for the development of Federal cable legislation.

First, the bill recognizes diversity of information as a national interest and establishes access standards for the purpose of insuring that diversity.

Second, the bill allows States and local governments to regulate certain rates and to own cable systems, recognizing the importance and effectiveness of local control.

We do believe, however, that S. 2172, by increasing the role of the Federal Government and preempting State and local authority in many areas, goes too far toward a national cable policy.

For cities it raises two major questions:

First, what is the extent of Federal preemption it envisions with respect to the State and local authority?

And, second, what is the impact of the bill on existing franchise agreements?

A fundamental concern to cities is the sweeping language of section 603(1). This section gives the FCC exclusive jurisdiction in those areas of cable regulation covered by the bill and precludes States and local governments from establishing rules or policies regarding the matters dealt with in this bill.

Since the bill deals with virtually all areas of cable regulation, including those which have traditionally been dealt with at the local level, ownership, access, rate regulation and franchise fees, section 603(l) appears to limit the regulatory authority of local governments.

Consequently, unless the bill specifically authorizes State and local regulation in a given area, this section apparently precludes State and local regulation in the area.

The regulatory involvement of the FCC and the Federal Government should be limited to those matters identified as Federal concerns; that is, diversity of information, national ownership policy and a clear jurisdictional framework.

Since local interests predominate, States and local governments should have primary responsibility for the regulation of cable through the franchise process.

In addition, Federal cable legislation should deal with the telecommunications services and local voice and data functions of cable, as well as its programing functions.

Broad State and local regulatory powers are necessary to insure that cable systems meet local needs.

First, States and local governments should have broad franchising powers.

Second, franchising authorities should have the right to establish service standards, including minimum system capacity and access requirements and franchise areas.

Third, franchising authorities should have the authority to regulate the subscriber rates for basic cable service and to establish minimum levels of that basic cable service.

Fourth, franchising authorities should have the authority to regulate the rates charged to programers and service providers for the use of public, educational, governmental, and leased access channels.

Fifth, the franchising authority should have the right to establish reasonable franchise fees, a traditional right that local governments have in virtually every similar area.

The authority of the Federal Government should be limited to insure that Federal regulation is confined to matters of Federal concern.

First, Federal law should insure that all franchising authorities have the authority to guarantee access, regardless of when that franchise was awarded.

Second, Federal law should insure that the rights of the subscribers to privacy are guaranteed.

Third, Federal law should establish guidelines for national ownership policy that limit local concentration of ownership and encourage competition.

We have many concerns about specific provisions of the bill in addition to our general comments on the appropriate overall regulatory framework.

First, the access standards of section 606 should, if they are enacted, be only minimums rather than maximums.

Second, States and local governments should have clear authority to insure that the leased access channels are made available at nondiscriminatory and reasonable rates.

Third, basic cable service should be defined through the franchise process rather than by the cable operator.

Fourth, the FCC should not establish franchise fee ceilings.

Fifth, the FCC should not have the authority to limit foreign ownership.

Mildred Schwab, a commissioner from Portland, Oreg., will address that in greater detail later in the morning.

In conclusion, Mr. Chairman, to insure the attainment of the policy objectives of guaranteeing diversity of information allowing for local control and promoting competition, the National League of Cities believes that States and local governments should have primary regulatory authority over cable. The flexible and adaptable franchise process, rather than rigid Federal law, should establish the regulatory framework for cable.

Thank you, Mr. Chairman.

Senator GOLDWATER. Thank you very much, Ms. Reynolds.

The next witness will be Mr. Stanley Besen.

Mr. BESEN. Thank you.

The economic case for mandated leased channel access to cable requires the acceptance of four premises:

First, one must believe that there are economies of scale in the construction and operation of cable systems so that a single system with a given number of channels costs less than two or more systems with the same combined capacity.

As a result, only a single system would exist in any given geographic area. Cable, in short, would be a natural monopoly.

Second, one must believe that the presence of alternative suppliers of the services that cable offers, that is broadcasters, STV stations and DBS services, among others, provides insufficient competition to constrain the market power of the cable operator so that he is able to set market prices for his services that exceed their costs.

Third, one must believe that a mandated leased channel access arrangement can be designed that actually will reduce prices to consumers or increase the array of service offerings available to them.

Finally, one must believe that one can design a regulatory system to implement those arrangements at costs that are not excessive.

The findings that I want to report today are the preliminary results of a study of leased access that we at Rand have been conducting for the last several months under a grant from the Markle Foundation.

The results are directed at the question of how a mandated leased access system would affect prices and service offerings to subscribers on the assumptions that cable systems have market power and that regulation is costless, two obviously questionable assumptions.

The results, therefore, provide only a partial answer to the question of whether such a system of leased access is necessary or desirable. Nevertheless, the findings focus attention on what we believe to be the central issues in any evaluation of leased access.

We have two basic results to report.

First, if all channels must be leased on a nondiscriminatory basis but access charges are left unregulated, the array of program offerings to subscribers will be smaller but the prices of those services that remain will be lower as compared to a system in which the operator controls all channels.

Some services that the operator could have provided profitably will not cover all of their costs at the nondiscriminatory access charge that maximizes the profits of the operator.

Services that were marginal for the operator will not be provided by lessees. At the same time, competition among actual or potential channel lessees will reduce prices on those services that continue to be provided.

The effect on subscribers of this arrangement is, therefore, ambiguous. Although service prices fall, fewer services are offered to consumers.

Our second finding is that if nondiscriminatory leased access is mandated but access rates are regulated so they are equal to the operator's costs, not only will service prices decline, but service offerings will not change. Here clearly viewers are better off because they are able to choose from an unchanged array of offerings and to purchase them at lower prices.

What lesson do we draw from these results? It is not that we should mandate leased access and regulate access charges. For two reasons such a conclusion would be premature.

First, the analysis ignored the regulatory cost of implementing the leased access requirement, and if those costs are very great they may swamp the gains to consumers that the requirement is supposed to promote.

Second, we really are not sure about whether the market power that cable systems possess is sufficient to warrant the creation of a regulatory scheme designed to deal with the problem.

We can conclude, however, that without effective rate regulation the benefits of mandated leased access may turn out to be illusory.

Two final points.

First, it is unlikely that a requirement of mandated leased access without rate regulation can long endure. Without regulation, operators can be expected to set access charges in ways that thwart the goals that access advocates are seeking.

Under the partial separations proposal in S. 2172, for example, what is to prevent the operator from posting charges that discourage those lessees who might compete with the operator's own services? And if this turns out to be the case, demands that access fees be regulated might be difficult to resist.

Second, it is important to recognize that the market with which we should be concerned is not limited to cable. Therefore, since regulation of cable access will not be easy, it would be well to see whether, by encouraging the FCC to remove the remaining regulatory barriers that constrain other technologies, MDS, STV, DBS, and even additional broadcast stations, we can avoid the creation of market power by the cable system in the first place.

If effective competition emerged, we would be far better off, in my view, than if we were forced to erect a regulatory apparatus to mandate leased access to cable.

Thank you.

[The statement follows:]

Statement of Stanley M. Besen, Senior Economist, the Rand Corp.[1]

The economic case for mandated leased channel access to cable rests on four premises:

(1) There are economies of scale in the construction and operation of cable systems so that the cost of a single system with a given number of channels is smaller than the cost of two or more systems with the same combined capacity.

(2) The actual or potential presence of alternative suppliers of the services that cable provides—over-the-air broadcasters, subscription television stations, multipoint distribution services, direct broadcast satellites, videocassettes, telephone companies—is insufficient to constrain the market power of the cable operator, so that he is able to set prices for his services that exceed their costs.

(3) Mandating leased channel access will produce lower prices to cable subscribers, or a wider variety of service offerings, or both, than would a system in which the operator determines the services to be provided and the prices to be charged.

(4) The costs of the regulatory system required to implement the leased access requirement are smaller than the gains to subscribers from imposting it.

An access requirement cannot be justified on economic grounds if there are no scale economies in system operation (so that competitive cable systems are feasible in the same market), or other suppliers constrain the market power of even a "monopoly" cable system, or there are no reductions in prices or improvements in service offerings from mandated leased access, or the costs of implementing the requirement are very large.

The findings I want to report today are the preliminary results of a study of leased access that we at Rand have been conducting for the last several months. They are directed at the question of how a mandated leased access system would affect prices and service offerings, on the assumptions that cable systems have market power and regulation is costless. Thus, they provide only a partial answer to the question of whether such a system is necessary or desirable. Nevertheless, the findings focus attention on what we believe to be the central issues in any evaluation of leased access proposals.

There are two basic conclusions:

First, if all channels must be leased on a nondiscriminatory basis but access charges are unregulated, the array of program offerings will be smaller but the prices of those services that remain will be lower as compared to a system in which the operator controls all channels. Some services that the operator could have provided profitably will not cover all of their costs at the nondiscriminatory access charge that maximizes the profits of the operator. Thus, services that were "marginal" for the operator will no be provide be provided by lessees. At the same time, competition among actual or potential channel lessees will reduce prices on those services that continue to be provided.

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[1] This statement is an outgrowth of work performed under a grant from the John and Mary R. Markle Foundation to the Rand Corp. The views expressed are the author's own.

Whether subscribers are better or worse off as a result of mandating nondiscriminatory leased access but not regulating access charges is, therefore, unclear. Although service prices fall, fewer services are offered.

Second, if nondiscriminatory leased access is mandated but access rates are effectively regulated so that they are equal to the operator's costs, not only will service prices decline but service offerings will not change. So long as the revenues generated by a service are at least equal to its own costs plus the cost of constructing and operating its channel, it will be provided. Here, clearly, viewers are better off because they are able to choose from an unchanged array of offerings and to purchase them at lower prices.

What lesson should be drawn from these results? It is not that we should mandate leased access and regulates access charges. Such a conclusion would be premature. If the regulatory costs of implementing the leased access requirement are very large—and it appears that regulating access charges on thousands of cable systems would be no easy task—then they may swamp the gains to consumers that the requirement is supposed to promote. Moreover, we do not know how large the gains to consumers will be because we are unsure about the market power that cable systems do, or will, possess. We can conclude, however, that without effective rate regulation, the benefits of mandated leased access may turn out to be illusory.

There are two final points that I would like to make. First, it is unlikely that a requirement of mandated leaed access without rate regulation can long endure. Without regulation, operators can be expected to set access charges in ways that thwart the goals that access advocates are seeking. Under the partial separations proposal in S. 2172, for example, what is to prevent the operator from posting charges that discourage those lessees who might compete with the operator's own services? And if this turns out to be the case, demands that access fees be regulated might be difficult to resist.

Second, it is important to recognize that the market with which we should be concerned is not limited to cable. Therefore, since regulation of cable access will not be easy, it would be well to see whether, by encouraging the FCC to remove the remaining regulatory barriers that constrain other technologies—MDS, STV, DBS, and even additional broadcast stations—from competing with cable, we can avoid the creation of market power by the cable operator in the first place. If effective competition emerged, we would be far better off than if we were forced to erect a regulatory apparatus to mandate leased access to cable.

Senator **Goldwater**. Thank you very much.

Our next witness will be Mr. Vincent Wasilewski, president of the National Association of Broadcasters.

Mr. Wasilewski.

Mr. **Wasilewski**. Thank you, Mr. Chairman.

You are to be commended, Mr. Chairman, for compiling an insightful and promising array of legislative provisions. The process of discussion and refinement initiated by you and your subcommittee in these hearings this week could have found no better starting point than S. 2172.

Broadcasters' concerns about cable television are nothing new. Broadcasters alternatively have enjoyed and endured an inevitably entangling interrelationship with cable television since the first cable was strung 3 decades ago.

Broadcast stations and networks have supplied cable with the core of its service, competed with cable, owned cable systems, divested their ownership pursuant to Government decree and more recently have begun to provide new and diverse program services specifically for cable systems use.

I am confident that in sharing with you the view of cable from the broadcaster's perspective that we can be helpful in your efforts to fashion a legislative package which promotes the greatest benefit and value to the consumer.

I have submitted an extensive statement for the record, but I would like just to summarize in a few minutes that statement.

Let me especially be upfront about one thing. Too long and too often broadcasters have been characterized as fearful obstructionists opposing cable development with every regulatory weapon in the Government's arsenal of rules and regulations.

NAB recognizes that cable is a vital and vibrant medium capable of enhancing television services to the viewing public. What NAB and broadcasters seek is not insulation from cable competition but the ability to compete, not in the hearing rooms of the Congress and not on the eighth floor at the FCC, but in the marketplace. We would welcome the opportunity to compete fairly equitably and openly with cable.

Thus, our position with respect to cable rests on three basic principles.

First, fair and equitable access to programing, the resolution of the again outstanding issues arising from cable's use of broadcast signals and programs; second, open entry, the ability to participate fully in ownership and development of cable television; and third, regulatory parity, parity not through excessive regulation of competing media like cable, but through continued deregulation of broadcasting.

S. 2172 is a positive step toward realization of these goals. In prohibiting imposition of cable broadcast cross-ownership restrictions, it would allow broadcasters to participate fully in cable.

We thank you, Mr. Chairman, for recognizing that yesterday's theories must give way to today's reality. The resources and expertise of broadcasters flow naturally toward cable and offer an enhanced opportunity to provide more and better cable services to the public.

In today's competitive environment where broadcasters and cable operators compete with other new and expanded media, it is sheer fantasy to assume for one instant longer that a broadcaster would invest millions of dollars in a cable system only to assure subpar competition for its broadcast station or network.

Your bill recognizes today's reality, Mr. Chairman, and NAB heartily endorses its prohibition on cross-ownership restrictions.

S. 2172 also deals with a matter of especially significant concern to broadcasters, cable television's use of broadcast signals. Never have cable systems been required to compete with broadcasters on fair and equitable terms. Broadcasters continue, as we have often said, to be shot with their own gun. Cable systems continue to use broadcast signals and programs without entering the program distribution marketplace.

The Federal Government continues to grant cable systems a subsidy in the form of a compulsory license to use broadcast programing. Previous attempts to resolve this matter have provided an up and down, on and off, zig-zag and criss-cross pattern of regulation.

Very recently, however, the blueprint for a sound, stable scheme to resolve this critical and central issue was carefully drawn. Legislation now pending in the House, H.R. 5949, embodies provisions designed to resolve both the major copyright and communications issues presented by cable carriage of broadcast signals.

It enjoys the support of the NAB, the National Cable Television Association, NCTA, and the Motion Picture Association of America, MPAA.

Moreover, it will promote the public interest by assuring a continued supply of program product to broadcast stations and cable systems, by assuring communities' access to the stations licensed to serve them and by preventing any possible distruption in the availability of distant signal programing to cable systems and subscribers.

A more complete outline of H.R. 5949 appears in my full statement. We very much want to secure prompt House passage of H.R. 5949 and urge you to act favorably on it when it comes before you.

In the meantime, any legislation to deal with the cable signal carriage issue should now conform to the provisions of H.R. 5949.

With respect to S. 2172, section 609 we believe is clearly inadequate. By leaving the Commission free rein, it does no more than perpetuate the greatest infirmity of the present scheme, namely uncertainty.

The combination of copyright law and regulation relied on in recent years offers little in comparison to the definitive statutory resolution of these issues in H.R. 5949.

Mr. Chairman, I emphasize NAB's desire to see such a definitive resolution of the signal carriage issue. Thus, we urge you to refrain from adopting any inconsistent statutory provisions.

And, lastly, if I may digress for one moment, Mr. Chairman, to ensure coverage of all of our basic concerns, we are very grateful for your efforts to deregulate the broadcast industry. The recent passage of S. 1629 by the Senate is particularly gratifying and, of course, we are hopeful additional deregulation legislation will soon begin to progress toward enactment.

We share you view that Federal cable legislation should be enacted and look forward to working with you, your subcommittee and your staff. And, once again, we believe you are to be commended for introducing this carefully crafted bill.

Thank you, Mr. Chairman.

Senator GOLDWATER. Thank you very much, Mr. Wasilewski. I just learned this morning of your intentions to leave the presidency of the association and go out on your own hook. I want to thank you for having been president of the association and for the great job you did with it, and I wish you the best of success in this jungle of law.

Mr. WASILEWSKI. Thank you very much, Mr. Chairman.

[The statement follows:]

STATEMENT OF VINCENT T. WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

INTRODUCTION

S. 2172 is a highly commendable effort to delineate and resolve many issues now confronted by local and state governments, as well as the federal government, in their attempts to regulate cable television. The National Association of Broadcasters (NAB) applauds the insight of Chairman Goldwater and this Subcommittee in initiating debate on the long overdue task of formulating a comprehensive federal statutory scheme for cable regulation. NAB agrees that federal legislation is necessary. The country's present communications law is approaching its golden anniversary. While it has proven flexible and durable during its lifetime, no one could suggest that the broad guidelines it applied to a previous era of communications technology do not cry out for specific, supplemental provisions to squarely address the issues raised by the development of cable television.

Congress should not leave the courts and the Federal Communications Commission to continue on their unguided trajectory. The issues resolved in S. 2172 are not new. They have been resolved before. In fact, they have been resolved one way one year, another way the next. They have been resolved one way by state governments, another way by the FCC. Even the FCC and the courts have been known to resolve them different ways. The question of who should resolve these issues has often been an issue itself with local and federal authorities competing for jurisdiction. Definitive federal legislation along the lines suggested by S. 2172 is necessary to end this confusion and uncertainty.

NAB's interests, of course, do not span the entire scope of the bill. Nonetheless, the close but intensely competitive relationship between the broadcasters and cable industries demands that NAB speak to those matters which concern broadcasters. NAB appreciates this opportunity to express its views on the need for federal legislation concerning cable television and the specific proposals embodied in S. 2172. Broadcasters are concerned about cable television and how it is and may be regulated. Broadcasters alternatively have enjoyed and endured an inevitably entangling interrelationship with cable television since the first cable was strung three decades ago. Broadcast stations and networks have supplied cable with the core of its service, competed with cable, owned cable systems, divested their ownership pursuant to government decree, and, more recently, have begun to provide new and diverse program services specifically for cable systems' use.

At the outset, NAB emphasizes its recognition of cable as a vital technological medium which is here to stay. Erecting roadblocks in the path of cable development or strapping cable with a web of entangling regulations is not NAB's goal. NAB approaches the cable medium as it approaches any other emerging competitive medium—as suitor and competitor. The premises underlying the positions NAB has taken are not derived from fear of competition. Rather, they spring from three basic propositions:

Competition between broadcast stations and cable systems should be unfettered, but fair;

Broadcasters should not be precluded from entry into cable;

As between broadcasting and cable, regulatory parity is desirable and should be achieved through deregulation of broadcasting rather than by burdening cable with broadcasters' current regulatory load.

Of course, the heart of the matter in NAB's eyes will always be the use of broadcast signals by cable systems. Without broadcast signals, cable systems simply never would have developed. Even today, few, if any, cable systems could stay in business without using broadcast programming. Broadcasters have bitterly resented this state of affairs and have spoken out fiercely seeking redress of this grotesque distortion of the notions of competition and the marketplace.

NAB regrets that it still must devote considerable time and effort to recounting inability of federal policy makers to redress this stark competitive imbalance, this subsidy of one competitor by its competition. At the same time, NAB neither apologizes nor shrinks from the wearisome task. The fact of the matter is that the issue is unresolved in the law. It is also a fact that the issue is closer to a sound, long-term resolution than ever before. Thus, if NAB belabors the point, it reflects only an intense desire to eradicate a grave injustice perpetuated at broadcasters' expense for over two decades.

The following comments, however, are arranged not in order of NAB's concern, but in the same sequence as they appear in the bill:

I. OWNERSHIP OF CABLE SYSTEMS

NAB enthusiastically supports Section 605(a) of S.2172, which bans restrictions on ownership of cable systems. In particular it would eliminate the present restrictions imposed by the FCC which prohibit broadcast networks from owning cable systems and television stations from owning cable systems located within their Grade B contours. NAB has repeatedly demonstrated that these restrictions are baseless and unnecessary. Section 605(a) recognizes this, and NAB applauds its inclusion in the bill.

Several recent reports prepared by the FCC staff itself have demonstrated the lack of need for such cross-ownership restrictions. For example, the "Recommendation of the Network Inquiry Special Staff to the Federal Communications Commission" (December, 1980) included a recommendation that rules prohibiting network ownership of cable systems be repealed. Similarly, a "Staff Report on Policies for

Regulation of DBS" (Direct Broadcast Satellites) opposed cross-ownership restrictions on the various television media. Most recently, the staff of the Commission Office of Plans and Policy recommended rescission of the Commission's cable-broadcast cross-ownership bans ("FCC Policy on Cable Ownership," November, 1981). These studies reinforce NAB's view, as well as the rationale of Section 605(a) that no reason exists to saddle the marketplace with cross-ownership restrictions.

In 1970, when the Commission initially adopted broadcast-cable cross-ownership restrictions, it theorized that they would enhance competition by preventing conflicts of interest on the part of established broadcasters who chose to enter the then infant cable industry. That theory, however, was just a theory. The Commission acted without the benefit or support of evidence showing that broadcast-cable cross-ownership would hamper or harm the devlopment of cable television.

Now, the theory itself is demonstrably faulty. In the context of rapid and continuing cable growth and development, rules ostensibly adopted to prevent retardation of cable development are patently ludicrous. Spurred by technological developments such as nationwide program distribution by satellite and consumer demand for additional program choices, cable has grown at a dramatic rate which will not abate in the foreseeable future. Already cable is available to over half the television households in this country. By the end of this decade, even pessimistic projections envision well over a majority of viewers as cable subscribers. Theory must give way to the observable reality that cable will continue to grow and develop at a rapid rate.

Furthermore, the nature of the cable franchising process, as well as that of the operation of cable systems, will continue to preserve and enhance the diversity of program choices offered by cable systems. Local franchising will continue to be a highly competitive process. A local broadcast licensee applying for a franchise would bear no chance of securing a franchise if it proposed only a narrow array of unattractive service and program options for purposes of minimizing competition to its broadcast station. The franchising process, possibly complemented by federal legislation, will assure that broadcaster and networks secure franchises only where they are judged to have submitted the superior proposal.

Of course, the greatest assurance that cable will provide the diversity of services long envisioned by the public and policy makers is the marketplace itself. Cable and broadcasting now are but two of the competing players on an increasingly crowded state on which Multiple Distribution System (MDS), Subscription Television (STV), videodiscs, videocassettes, low power TV, and, perhaps, in the future, DBS, also compete for the audience's attention. Regardless of who owns them, cable systems will have to compete and establish their niches in an increasingly competitive marketplace in order to succeed. Thus, cross-ownership rules are needless and anachronistic instrusions into the marketplace, especially in an era where government is dedicated to ferreting out and eliminating burdensome, unnecessary regulations.

Beyond their functioning as a needless governmental intrusion into a dynamic marketplace, the rules prohibiting network and local station ownership are counterproductive. Broadcasters have considerable programming expertise and resources. Cross-ownership prohibitions effectively limit them from devoting their expertise to or investing their resources in cable. Elimination of cross-ownership restrictions would enable broadcasters to bring their expertise and resources to bear in the provision of cable service without needless limitations. Ultimately, the viewing public will be better served.

Therefore, Section 605(a) of the bill not only serves the interest of consumers, but also furthers NAB's interest in maximizing broadcasters' opportunities to participate in the development of new technologies.

NAB is concerned, however, that Section 605(d) may overreach and negate the thrust of Section 605(a) to permit broadcast stations and networks to participate fully in cable television. Section 605(d) would prohibit colocated cross-ownership of a cable system and a "telecommunications carrier," as defined in Section 604(15). Some broadcast licensees do operate minimal common carrier facilities in their local service areas. Often, this involvement in common carrier activity amounts to no more than leasing the excess capacity of communications facilities used primarily for internal communications. Others may have subsidiaries which are engaged in providing limited or specialized common carrier services. Under 605(d) in its present form, these broadcasters would be prohibited from owning cable systems in the areas served by their common carrier operations regardless of their de minimus nature.

NAB sees no reason to apply the prohibition of 605(d) in those circumstances, and doubts that such a result was intended. It is one thing to prohibit a local telephone company from providing cable service. It is quite another to apply the same prohibition to a broadcast station or other entity which provides only limited or specialized common carrier services in a small segment of the market. In the latter case, the traditional concern about the ability of a common carrier to exploit its monopoly position is nonexistent.

Therefore, NAB urges that the prohibition in Section 605(d) be narrowed so as not to apply to carriers which provide a limited or specialized service to only a small segment of the market.

II. DEDICATED CHANNELS

NAB takes no position at this time on the desirability of requiring cable systems to set aside channels for particular uses. However, NAB is mindful that as a practical matter cable systems are monopolies with power to exclude programming or services other than those the system itself wishes to provide. Because some broadcasters are or will be engaged in the production of programming which they may wish to make available to cable subscribers, NAB is concerned that cable systems may be unwilling to make channel space available for such programming. At this time, one can only speculate as to the eventual extent of this problem, if it ever does occur. The adequacy of remedies under the antitrust laws also is uncertain. Given the unusually intrusive nature of a dedicated channel requirement and the fact that it strikes at the very heart of how cable is to be regulated (i.e., as a common carrier or as a "broadcaster"), NAB at this time merely reserves its right to seek appropriate remedial action when and if it becomes necessary.

III. RATE REGULATION

NAB traditionally has taken no position on cable rate regulation and takes none at this time on Section 607 of the bill. NAB would observe, however, that Section 607(c), which prohibits rate regulation of leased access channels, could function to negate the intended benefits of requiring dedication of leased access channels, as is required by Section 606(a)(2). The broad prohibition of rate regulation in Section 607(c) would leave a potential channel lessee with no remedy or recourse if a cable system lessor offered to lease a channel only at a prohibitive or unreasonably high rate. A cable system faced with the prospect of leasing a channel for a pay service which would compete directly with its own lucrative pay service would have a considerable incentive to discourage channel leasing by offering leased channels only at excessive rates. Consequently, the dedication of channels in and of itself may provide no real opportunity for potential channel lessees of members of the public which desire to see the channel lessee's service.

In essence, monopoly status can be exploited not only by a refusal to deal, but also by an exorbitant price which has the same effect as an outright refusal to deal. If dedicated leased channels are to be mandated, then the law should not rob the potential beneficiaries of the mandate of the real opportunity to lease channels by prohibiting governmental review of rates charged for such service.

IV. CARRIAGE OF BROADCAST SIGNALS

The heart of NAB's concerns about cable television always has been the carriage of broadcast signals by cable systems. Initially, broadcast stations enjoyed the ability of cable to provide reception of their signals in cases where terrain features prevented good reception of their off-air signals. As cable began to employ long distance microwave links, broadcasters' delight with cable was replaced by concern that cable systems not only would provide better reception in fringe areas and other areas of poor reception, but also would import broadcast signals from distant markets into their local markets. The essence of broadcasters' concern was not fear of competition per se, but the ability of cable to use distant signal programming without having to enter the program distribution marketplace, bargain with the station or program owner, or pay anything, much less a marketplace price, for the programming. As one broadcaster observed at the time, broadcasters were being "shot with their own gun"—and were without remedy under an antiquated copyright law. As anyone would have expected, and as all well know, the decade of the sixties found broadcasters seeking relief from the Congress, the Courts, and the Commission. In Congress, broadcasters sought modernization of the copyright laws to establish an equitable and truly competitive marketplace in which broadcasters could compete with cable. Program producers and broadcasters also sought interpretations of the 1909 Copyright Law which would have applied normal copyright liability to cable television. The Courts, however, deferred to Congress. Meanwhile—and with some success—broadcasters urged the Commission at least to limit to some extent the free flow of broadcast programming used by cable systems to compete with broadcasters. If broadcasters could not compete with cable on an equitable basis, they at least wanted to prevent cable from exploiting its highly advantageous position to cripple and stifle the provision of broadcast service to the public.

The supposed resolution of the broadcast/cable competition issue was thrust upon the affected industries in 1971. The so-called "Consensus Agreement" developed by the Nixon Administration led to adoption of various rules by the FCC in 1972 and establishment of a compulsory license for cable carriage of broadcast signals in the 1976 Copyright Act. The FCC rules and the copyright compulsory license were designed to be complementary. The FCC rules effectively counterbalanced the compulsory license by limiting what otherwise would have been the unrestricted carriage of broadcast signals by cable systems at minimal, noncompensatory rates.

This complementary regulatory structure, however, had begun to disintegrate even before the 1976 Copyright Law was enacted. Within two years of the copyright law's effective date (January 1, 1978), the FCC deleted key regulatory provisions, gutting the regulatory structure envisioned by Congress and collapsing its counterbalancing effect. The specific rules involved had limited the number of distant signals cable systems could import and required cable systems to recognize and protect broadcasters' exclusive contractual rights to show syndicated programs (e.g., "M*A*S*H," "The Mary Tyler Moore Show") and feature films in their markets.

In the wake of the Commission's actions, broadcasters joined with program and motion picture producers to seek redress of the resulting and, in NAB's view, harmful imbalance. Ideally, NAB has favored full, normal copyright liability for cable carriage of distant signals and maintenance of the requirement that cable systems carry local broadcast stations (on a gratis basis). Ultimately, however, NAB has chosen to be realistic. With the encouragement of Chairman Robert Kastenmeier of the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, NAB sought to resolve the dispute among the broadcast, cable, and program production industries through negotiation and compromise. Happily, NAB, the National Cable Television Association (NCTA), and the Motion Picture Association of America (MPAA) have succeeded.

On March 30, 1982, the House Judiciary Committee reported out H.R. 5949, a bill introduced by Chairman Kastenmeier which embodies provisions which continue to enjoy the support of NAB, NCTA, and MPAA. The bill is now before the House Committee on Energy and Commerce on a joint referral.

H.R. 5949 is a significant piece of legislation. It resolves the major issues arising from cable television carriage of broadcast signals. Like the earlier efforts to resolve these problems, it includes copyright and communications provisions. Unlike previous efforts, however, it insures stable, statutory resolution of these issues.

A copy of H.R. 5949 is attached to this statement in the Appendix. Its basic provisions are set out in the following outline:

SYNDICATED EXCLUSIVITY

1. Television stations in all markets may request exclusivity protection for the duration of their contract to show the program.

2. Independent television stations may request exclusivity protection for 300 feature films per calendar quarter; network affiliated stations may request exclusivity for 100 feature films per calendar quarter. A film may be protected for no more than 2 calendar quarters per year.

3. Exemptions:

a. Cable systems located outside all television markets as of November 1, 1981.

b. Cable systems with fewer than 3,000 subscribers.

c. Programs on signals carried by the cable system or another cable system in the same community prior to March 31, 1972.

d. Cable systems granted waivers to the rules prior to June 25, 1981.

e. Programs carried on stations delivered via satellite to the system if the station acquired broadcast rights to the program prior to enactment of the bill and the station has notified the cable system that it need not protect the program.

4. Waivers: The FCC may grant waivers in overlapping market situations provided the station on which the program appears obtains a net weekly circulation of 5 percent and places a Grade B contour over all or part of the community in which the system is located.

5. Enforcement: Failure to provide syndicated exclusivity protection as requested shall constitute copyright infringement for which remedies (damages, injunction, etc.) may be sought in the federal courts. However, no action for infringement will be permitted where the FCC rules within 90 days of receipt of notice of a violation

that the secondary transmission was due to technical errors or other factors beyond the reasonable control of the cable system.

6. Transition period: The syndicated exclusivity provisions protection will become effective:

a. Six months after enactment in the top 50 markets.

b. One year after enactment in the second 50 markets.

c. Two years after enactment in the hundred plus markets.

7. The FCC is directed to promulgate rules and regulations as are reasonably necessary to carry out these provisions.

MUST CARRY

1. The FCC is directed to require carriage of television stations according to its present "must carry" rules.

2. Exceptions:

a. A cable system with 36 or fewer actuated channels may elect not to carry any station which receives neither a 1 percent share of viewing hours in non-cable homes in the county in which the system is located nor a 2 percent share of viewing in all homes of that county. Once a signal is deleted pursuant to this exception, the cable system need not carry the signal again until the system expands beyond 36 channels. A cable system, however, must carry the signals of up to three noncommercial educational stations if they place a Grade B contour over the cable system, unless the noncommercial stations duplicate simultaneously 100 percent of their instructional programming and 90 percent of their other programming. To compensate for carriage of such additional noncommercial stations which do not meet the 1 percent/2 percent share criterion, a cable system may delete an equivalent number of network stations which substantially duplicate service provided by other signals required to be carried by the system. The cable system must delete such duplicate network affiliates in the order of their distance from the cable system beginning with the most distant.

b. Cable systems with 12 or fewer channels need not carry stations which broadcast subscription television (STV) programming, but must carry the basic commercial network local affiliates unless they broadcast predominantly STV programming. Cable systems with more than 12 channels need not carry any station which broadcasts predominantly (more than 50 percent) STV programming.

3. The FCC may not require carriage of LPTV stations, drop-ins, DBS, MDS, or other radio communications services intended for direct reception by members of the public.

4. Carriage of broadcast signals while not in compliance with the "must carry" provisions shall constitute a copyright infringement.

NETWORK PROGRAM EXCLUSIVITY

1. The Commission is directed to require cable systems to delete duplicating network programming in accordance with its rules in effect on October 1, 1981. Additionally, stations would be provided same day nonduplication protection vis-a-vis signals from another time zone. In the Mountain Time Zone, protection would be limited to stations more than one time zone away. However, a cable system need not delete network programs from stations from which it normally carried a full day of network programming prior to October 1, 1981.

2. Carriage of broadcast signals while not in compliance with the network nonduplication provisions will constitute a copyright infringement.

SPORTS PROGRAMMING

1. Violation of the current FCC rule protecting sports blackouts would constitute a copyright infringement.

2. Distant retransmission of a nonnetwork broadcast of an intercollegiate football game between September 1 and the second Saturday in December of each year more than 120 miles from a VHF station or 45 miles from a UHF station showing the game would constitute a copyright infringement.

OTHER PROVISIONS

1. *Fees.*—The present compulsory license fee schedule for cable systems is retained subject to triennial adjustment for the effects of inflation. Also, cable systems which carry no distant signals will be required to pay no fees.

2. *Rate adjustments:*

a. The Copyright Royalty Tribunal (CRT) may consider the impact of imposing syndicated exclusivity requirements on cable systems in the hundred plus markets in the 1983 inflation rate adjustment.

b. In adjusting rates to reflect the FCC's deletion of distant signal limitations, the CRT is directed to differentiate between new signals on which a cable system is required to provide syndicated program exclusivity protection and those on which no deletions are required.

3. *Radio royalties.*—The CRT is directed to award royalties to radio claimants, with a $300,000 minimum specified for noncommercial radio.

4. *Resale carriers.*—The present law is clarified to provide that carriers which distribute distant signals are exempt from copyright liability.

While H.R. 5949 represents a substantial compromise on NAB's part, NAB supports this legislation as a realistic resolution of the issues which will adequately serve the interests of the public:

1. By codifying the FCC's "must carry" rules requiring carriage of local stations (with some exceptions), H.R. 5949:

Assures the public continued access to the programming provided by stations licensed to serve their communities.

Maintains the ability of local stations to serve their communities and to compete in their local markets.

Prevents cable operators from insulating themselves from competition from local broadcast stations.

Assures the availability of free broadcast programming not only to cable subscribers, but also to those who find cable unavailable, unaffordable, or unappealing, by insuring that lack of local cable carriage cannot sap the vitality of local stations.

Insures that cable systems with limited channel capability are not "saturated" with "must carry" signals and may provide some nonbroadcast programming desired by their subscribers.

2. By permitting broadcasters to bargain for and protect their exclusive rights to show syndicated programs and feature films in their markets, H.R. 5949:

Places broadcasters and cable operators on the same competitive plane in the marketplace, enabling each to gain exclusive program rights against the other.

Assures a continuing and diverse supply of quality programming to broadcasters, cable systems, and other media (and ultimately to the viewing public) by permitting program producers to control use of their programs and, thus, preserve their ability to seek a fair return on their programming investments.

Enables broadcasters to provide attractive programming to cable and noncable viewers by preventing duplication of their syndicated programming and feature films by cable systems in their markets and, thus, protecting their investment in increasingly expensive syndicated programming.

3. By retaining the compulsory license and basic fee structure of the present copyright law, H.R. 5949:

Permits cable to continue to provide the program diversity afforded to its subscribers through unrestricted carriage of distant broadcast signals without interruption or the need to structure private mechanisms for authorizing carriage of distant signal programming.

Precludes large increases in the cost of distant signal programming to cable systems which might in turn be passed on to their subscribers.

The existence of H.R. 5949 bears heavily on NAB's approach to S. 2172. H.R. 5949 resolves in a different manner the issues raised by Section 609. H.R. 5949 is a definitive and satisfactory resolution of most issues arising from cable carriage of broadcast issues. Section 609, by comparison, falls far short of the mark. It merely resolves what already has been judicially resolved, namely, that the Commission may regulate cable carriage of broadcast signals.

Ideally, H.R. 5949 will be enacted in this session of Congress, and NAB cannot too strongly urge this Subcommittee to accord it favorable action. If H.R. 5949 is enacted prior to enactment of S. 2172, then Section 609 need only be qualified to remain subject to the provisions of H.R. 5949. This would preserve the Commission's authority to deal with issues relating to signal carriage which are neither covered nor anticipated by H.R. 5949.

In the unfortunate event that H.R. 5949 falters, Section 609 alone would be inadequate in several respects. First, the present uncertainty surrounding possible future actions by the Commission with respect to broadcast signal carriage would be enhanced and prolonged. This would amount to pointedly poor public policy. As is obvious from the preceding capsule history of cable regulation over the past 20 years, broadcasters' multifaceted relationship with cable has occurred in a regulatory context of continuous confusion, uncertainty, and constant change. The roller coaster history of both copyright law and communications policy over the past 20 years has been the epitome of regulatory instability.

All concerned parties—broadcasters, cable operators, and the public—could only benefit from stabilizing the regulatory framework in which the cable industry operates. Primarily, investment decisions by broadcasters and cable operators, and franchise proposals by cable operators, could be based on certainty as to what the rules of the game will be. The public also will appreciate continuity in the programming which cable systems and broadcasters may offfer. Section 609 would do no more than perpetuate uncertainty to the detriment of broadcast and cable service to the public.

Secondly, Section 609 is substantively inadequate, providing nothing more than authority which may or may not be exercised by the Commission. The few remaining regulations at the Commission requiring carriage of local signals and protecting network program exclusivity and sports blackouts could be repealed. The present philosophy of FCC Chairman Mark Fowler favoring wide-open "unregulation" creates considerable concern that the Commission might dismantle that remaining regulatory structure and challenge Congress to enact copyright legislation reflecting the same philosophy by eliminating cable's compulsory license. The history of cable regulation in the last decade illustrates the folly of relying on concurrent regulatory and legislative action. Concurrent action cannot be assured. The beneficiary of the first action has every incentive to attempt to defeat or delay the second action. Thus, for example, NCTA was able to delay and dilute the copyright legislation it agreed to support in 1971 following rapid regulatory action "unfreezing" cable development in 1972. Section 609 would permit, if not invite, a similar debacle.

In view of the above, NAB favors the provisions of H.R. 5949 and urges the same approach in S. 2172. Again, outside of H.R. 5949's shadow, NAB would favor more stringent provisions respecting required carriage of local signals and normal copyright liability for distant signals. Nonetheless, the package of provisions in H.R. 5949 now enjoys the support of the affected industries and provides a mutually satisfying resolution of numerous troublesome issues.

One pressing matter left unresolved by H.R. 5949, carriage of teletext services included in the signals of broadcast stations, should be resolved in this legislation. NAB urges inclusion of a provision which would require cable systems to carry teletext material included in those television signals required to be carried by the cable system. Otherwise, the ability of broadcast stations to provide teletext services would be crippled. To reiterate, nearly 30 percent of the television households in this country depend on cable for television reception, and that percentage is growing by leaps and bounds. In many areas the majority of homes already are cable subscribers. By removing a sizeable portion of the potential audience for teletext, lack of cable coverage would enhance the risk for a broadcaster wishing to provide teletext service and create a tremendous disincentive for bradcasters to invest in this new and valuable service. While it is true that cable systems may provide teletext services themselves, the interests of nonsubscribers must not be neglected. The possibility that they will be able to enjoy the benefits of broadcast teletext services would be diminished considerably if cable systems were not required to carry broadcasters' complete signal, including teletext transmission.

Again, as is the case with local broadcast signals generally, leaving cable systems free to delete teletext transmissions would enable them to monopolize teletext-type services available to their subscribers. A cable system generating its own revenue producing teletext service would have an inherent incentive to delete competing teletext services offered by broadcasters. Cable systems should not be permitted to exploit their monopoly status and follow their self-serving competitive incentives to create a hurdle to development of broadcast teletext services available to the entire public.

Finally, from a technical standpoint, teletext transmissions are part of the television station's signal. They take up no additional channel capacity on the cable system. They use only spectrum the broadcaster is licensed to use and will remain under the control of the broadcaster. It would make no more sense to permit deletion of teletext than it would to permit deletion of soon-to-be-implemented stereo or second-language sound channels included in the television station signal.

Therefore, NAB urges inclusion of a provision to require cable systems to carry teletext transmissions included in local broadcast signals.

V. FAIRNESS DOCTRINE, EQUAL TIME, AND REASONABLE ACCESS

NAB strongly favors Section 610, which insulates cable from the fairness doctrine and political broadcasting requirements which plague broadcasters in derogation of their First Amendment rights. NAB's deep conviction that these restrictions on broadcasters not only mock the First Amendment, but stifle robust debate and constrict the flow of information to the public, dictates NAB's support of Section 610. NAB hopes the Subcommittee will soon give further consideration to broadcasters' concerns about these requirements.

VI. PRIVACY

NAB supports the provisions of Section 612 protecting subscribers' privacy. Viewer preferences are not matters which should be bandied about in the public domain. NAB commends this provision as necessary and appropriate to prevent serious compromise of cable viewers.

VII. TECHNICAL STANDARDS

NAB favors the maintenance of technical standards applicable to cable system operations, but urges a slightly broader mandate than that embodied in Section 613. The Commission should be required to apply technical standards which assure that broadcast signals and other retransmitted programming are furnished to all of a system's subscribers without material degradation in the quality of their signals. This would insure, for example, that consumers are not deprived of quality reception of local stations when they decide to subscribe to cable. Degradation of signals frustrates not only the viewer, but also the stations licensed to serve the viewer's community. Such rules also prevent cable operators from engaging in self-serving neglect of signal and picture quality with respect to services competing with programming in which the cable operator has an interest. The Commission presently maintains rules requiring carriage of local stations without degradation. This requirement at least should be codified and delineated as a purpose for the imposition of technical standards on cable system operations.

VIII. RECORDS

NAB generally is not directly concerned with the imposition of record-keeping requirements on cable operators. NAB, however, does support the Commission's authority regarding record-keeping where matters such as signal carriage and technical standards are concerned.

IX. EQUAL EMPLOYMENT OPPORTUNITY

NAB favors and supports the concept of equal employment opportunity, but takes no position with respect to a specific statutory mandate to the FCC with respect to cable.

X. SIGNAL PIRACY

NAB favors Section 2, which adds a specific remedy provision to existing Section 605 of the Communications Act. The unauthorized reception of communications such as subscription television programming (whether delivered over-the-air or by cable) effectively robs the programmer of subscriber revenues. Clear-cut remedies, such as those provided in new Section 705(b), will provide a valuable tool to programmers in protecting their signals and programming from theft.

CONCLUSION

NAB supports the concept of comprehensive, federal cable legislation. S. 2172 is an excellent vehicle by which to commence real progress toward achievement of that goal. This bill provides focus on issues of concern not only to cable's broadcast station competitors, but also the wide variety of interests affected by cable.

NAB urges that the process of dialogue and refinement sparked by introduction of S. 2172 not abate. The issues are too significant to relegate to inconsistent, unstable, piecemeal policymaking. At the same time, NAB urges this Subcommittee and this Congress to seize the opportunity before it to resolve the long and bitter dispute between the cable and broadcast industries over cable's use of broadcast programming. In so acting, Congress would serve not only the interests of the affected industries, but also—and more importantly—those of the viewing public.

Senator GOLDWATER. The next witness will be the Honorable Mildred Schwab, city commissioner from Portland.

Ms. SCHWAB. Thank you.

Mr. Chairman and Senators, I am Mildred Schwab, an elected commissioner of the city of Portland and as one of my assignments I am in charge of the TV cable operations.

Senator Goldwater, you are to be commended for recognizing the growing impact and complexity of the cable television industry on American cities and the need to establish the basis for Federal, State, and local relationships in this area.

The city of Portland is equally concerned about each of the issues raised by the National League of Cities and supports their recommendations on these matters because through extensive experience with cable we have learned the importance of local discretion and flexibility to meet changing needs. Cable TV information, entertainment, and services are definitely a local concern. Every region of the country and, indeed, even neighborhood cities have different needs for the type of cable operations suitable for them.

If local control and discretion is replaced by Federal decisionmaking, the advantages of cable to cities will disappear. I think we must remember through all our discussions about cable TV that we are talking about the means by which urban residents will be getting information about the world they live in. Because each city has different needs and methods, I believe it certainly justifies a much stronger local government role and less Federal influence.

As an elected representative of a large city served by a 50 percent locally owned Canadian company, I am the spokesperson for the fifth which was referred to, foreign ownership.

Section 605(b) of the legislation would give the FCC the authority, and in effect direction, to ban Canadian ownership of cable companies in this country. The residents of Portland are concerned by this provision because we have awarded a cable franchise to a Canadian firm.

If this becomes law, Congress will have virtually repudiated our cable franchise process. This process involved 6 years of careful study, countless public hearings and extensive debate. It culminated in the selection of what we believe to be the best company for Portland's largest franchise.

Our 6-year process and its results may come to naught, and for no good reason.

The bill seeks to achieve at least two goals, one of which is to encourage industrywide competition, on the assumption that competition benefits consumers.

I have no quarrel with the goals. Indeed, I applaud them. Portland directly benefited by the increased competition provided by a Canadian company. Cablesystems Pacific not only competed but was selected for our east side franchise after a lengthy and detailed examination of their proposal by a citizens task force, a technical consultant, city staff, and the council.

They were selected because they offered the best service at the most reasonable rates with the greatest responsiveness to community needs.

During the franchising process we considered the foreign ownership issue. We decided it was irrelevant. Cities are not precluded by Federal law from acquiring other services and materials from foreign companies and therefore should not be in this case. More to the point, they were prepared to offer better cable service than their competitors.

I don't accept the argument that the provision will penalize the Canadian Government and encourage it to open its market to U.S. cable companies. I believe the people who will be penalized are the Canadian cable companies and the thousands of U.S. citizens, like those in Portland, who have invested in those companies or rely on them for service.

Our city placed a high value on local ownership. We believed that to be a sound way of insuring that the franchise holder remained responsive to our residents' needs. While other companies were willing to permit some local ownership, only Cablesystems Pacific was willing to enter into a joint venture 50/50 with local business people.

Local investors could suffer if the foreign ownership provisions are adopted. Even though the FCC may not act immediately, the fate of our local investors would always rest in the hands of a Federal commission thousands of miles from Portland. So much, then, for local control of a local communications system.

Of even more importance is the fact that the people of Portland will lose. We have a system we like. Although the new system is not yet fully operational, the company is building and serving our community ahead of schedule.

Complaints are minimal and those which do come in are promptly addressed by the company. In short, we are very satisfied customers with no regrets about our choice.

If there were a Federal prohibition on foreign companies, not only would cable service be disrupted to as many as 126,000 households, but we would also lose the leverage we gained on the west side franchise through mutual buyout provisions in each of the two franchises.

Our existing contracts allow for the acquisition of one company by the other if its service is found to be significantly lower or its rates are not compatible. Such a provision improves service by its very nature. We would lose that leverage if the Canadian company is eliminated. Canadian cable companies serve only a very small number of U.S. subscribers.

The National League of Cities has urged Congress not to adopt foreign ownership restrictions unless foreign-owned companies threaten to dominate the cable market. I don't believe legislation should go further than that.

Thank you for the opportunity to testify here this morning and for your kind attention to our very real concerns.

Senator GOLDWATER. Thank you very much, Ms. Schwab.

I might just comment before we start a few questions. Relative to your concern on section 605, paragraph 2, this would not be retroactive. It would not affect any Canadian companies that are now operating. What it gives is the authority to the FCC to prohibit foreign ownership of cable if no reciprocal rights are granted.

In discussing this problem with the Canadian people I pointed out that it is not very easy for an American company to get into Canada. I am a great believer in doing unto others as you would have them do unto you. And if they want to play ball with us, we would play ball with them.

But this does not prohibit them completely and it is not retroactive. I wanted to put your mind at ease on that.

Ms. **Schwab**. Well, if I might just ask that one question, though. We do have a mutual buyout in ours. We have two companies and we have required that they offer the same type of service and the same rate. Would that also remain in effect then, or would that be ruled out by this?

Senator **Goldwater**. Yes; you have the agreement. We are not going to tear up any agreements. We are just trying to make it a little easier to understand this problem as we go into the future.

Mr. Myhren, is it your understanding that the leased channel obligation in the bill could be satisfied by the cable operator through the provision of paid services like HBO? In other words, does leased mean pay even though the usual arrangement is not strictly a lease?

Mr. **Myhren**. I am not quite sure if I understand the thrust of the question. I believe that cable operators have traditionally satisfied requirements or a desire on the part of those people who would like to use the channels to use them. There has certainly been no abuse demonstrated by the cable operators in this area.

I think certainly the need for programers to get to the home is satisfied both by the cable industry historically and by a vast array of new pathways to the home. The quotation I used from the ABC annual report makes it clear that there is a vast array of pathways. I think the Bortz's study that you heard earlier this week, Paul Bortz's study, shows that also. The OPP report comments on that.

So, in terms of the availability of pathways to the home, I think clearly they exist. And the idea of federally mandating some additional requirements seems to me to be unnecessary.

Senator **Goldwater**. Well, we feel that, too, and you have answered the question. We have had a lot of questions from HBO relative to the relationship of cable and HBO.

Mrs. Reynolds.

Ms. **Reynolds**. Yes, sir.

Senator **Goldwater**. I don't understand this Ms.

Is local rate regulation authority as effective an oversight tool as some have suggested and what other tools do you believe non-Federal officials should use to guarantee compliance with a franchise?

Ms. **Reynolds**. It is the league's belief and mine personally that the ability that a local government has to oversight is, first of all, superior to anyone else's because, as in many cases, we are the ones there day to day and our phones do ring should something not happen the way it has been promised, and that is a great impetus, as you well know, toward making sure things are monitored and oversighted correctly.

We feel, however, that if there are, for example, to be minimums imposed, whether it is through Federal action or through a local franchise agreement, and we believe the local franchise agreement to be a better way to impose any standards, that any oversight or monitoring capability is severely hampered unless it also has a series of things attached to it called fees and penalties for noncompliance.

Simply a broad statement that, yes, there will be oversight and monitoring without a specific grant of authority, hopefully at the local level, to enforce it, and to monitor, and approve things like the rate structure on basic services and to make sure that on the leased access channels, whether you are talking about what we call generically pay TV or leased access for services such as home banking, is not enough.

It is simply to say first come, first served without putting some kind of a hook in there, if you will, at the local level to make sure that it is not simply a matter of an operator always having the first come, first served because they are there when they open the door, and making sure that that does not preclude, for example, things like a minority community's access to telecommunications, that we are not precluding government access for libraries. Who was there first in that case, a library or a firehouse?

The wording of simply first come, first served we feel is not sufficient to give anyone any real authority, especially at the local level to monitor. Again, we appreciate having any monitoring and oversight authority, and we think it is appropriate, but that authority without the provisions behind it that allow us to enforce it, will not satisfy anyone's concerns.

Senator GOLDWATER. Well, having served on a city council, I lean a little bit your way.

Ms. REYNOLDS. Thank you.

Senator GOLDWATER. Mr. Besen, please tell us whether you share the cable industry's fears about the competitive impact of telephone company participation in cable, and also what role do you think cable can play in the provision of services not traditionally associated with cable?

Mr. BESEN. Let me say I am perhaps as ambivalent about the question of telephone company participation as I am about some of the issues which I reported on today.

On the one hand, the telephone company potentially provides one of the competitive checks to the market power that cable operators might conceivably acquire, particularly in connection with the nonvideo services.

If it turned out that some broadband services are available to subscribers only over cable and are not available over competing media, and of course there are alternatives to the telephone company as well, for example MDS, then I would be concerned about the market power of cable.

On the other hand, there is the serious problem, well known to students of telephone regulation, that the telephone company may, in competing with cable, engage in the cross-subsidization of those activities with the profits of some of their monopoly services. That is a question, as you know, that the FCC has been addressing in a large number of forums for a very long time and I don't think it is one that will be very easily resolved.

I would hope, however, that the telephone company would serve as one of the important competitive checks on whatever market power cable systems might otherwise acquire.

Senator GOLDWATER. Of course, the competitive aspect of telephone also hits the newspapers very hard and we tried to take care of that in our last year's bill and I think we did, except we find the newspapers now buying up cable.

Mr. Wasilewski, this is really the $64 question, but because you are on the way out by your own choosing you can say what you want.

Please tell us your opinion of the sports blackout provision in this bill.

Mr. **Wasilewski**. I go back quite a long way in the sports blackout problem. I go back to the days of rule 1–A in the major league and minor league baseball, which you may remember, where major league baseball was able to preclude even the radio broadcasts of, say, a Chicago Cubs game into Springfield, Ill., when Springfield was in the 3–I league and the Cubs were in the National League.

So I have been generally aware of both the problems and the concerns of sports. I have a tendency to lean toward the sports, just as you being a former city council member and leaning a little bit that way, but I think that perhaps the provision in this bill is much, much broader than the public should be saddled with. I will put it that way.

Just looking at this, it seems to me in the provisions of this bill that a cable would be precluded from carrying, say, in the Washington, D.C., suburban area or Washington on cable a New York Yankee game unless they got the consent of the Baltimore Orioles, and I think that is a pretty broad preclusion and I think that it should be subject to a little more compromise and give and take.

Senator **Goldwater**. Thank you.

Would any of the other members of the panel care to comment on that question?

Ms. **Reynolds**. Thank you, Mr. Chairman.

This question is of great concern to us in Denver. We are a great sports town. We are a great town anyway, but we have a number of professional franchises, including a minor league baseball club, the Broncos, the Nuggets. We have Rocky Hockey. We have the Avalanche professional indoor soccer. We are a great sports town, and we find it not to be terribly reasonable in our minds for this kind of a provision to come down through national legislation.

For example, the distances out our way, as they are yours, are extraordinary, and when you talk about a 50-mile radius, first of all, in Arizona, or Colorado, or many of our States, that is a preposterous amount of time. We drive that far very often to meet a friend for lunch. It is simply not an extraordinary distance for someone to travel for any purpose.

We also find, however, that more basically this, along with many other items, should be something that is determined more individually than on a national standard. For example, I don't think it would be appropriate, nor, as far as I know, to the owners of our franchises, to believe that they should block out all sports programs for theirs. I think different teams, even in the same region, have different needs and the city of Denver is a great supporter of our teams.

The Broncos, for example, who have been sold out for years and hopefully will be for years, have no reason to prohibit broadcasting games because they are filling the stadium. The Nuggets, our basketball team, needs to draw more people in as a rule. So they might want to have access to that kind of a provision. Our hockey team is doing so poorly in attendance at the moment that maybe they would be better served to open it up to the public through cable television or some other television just to develop an audience.

So we have come to the conclusion that this, along with other things, should be a matter for some individual determination because we feel it is important to keep sports alive in our community and there may be differing ways to do that.

Senator **Goldwater**. I recognize the great sports-minded position of Denver, and I haven't been home, but how did the Nuggets come out with the Phoenix Suns?

Ms. **Reynolds**. You creamed us.

You won, yes, sir.

Mr. **Myhren**. But it was close. It was very close.

I would agree with Cathy's comment on Denver as a city and I agree, I think, with everything he said on this issue. I would just add one example, that if it is the sports interest's desire to protect their home gate, and that is the reason for this provision, I think they are misguided on it.

I believe that the Rockies as a hockey team would do much better if there was more hockey shown in the market on television to whet the appetite of the fans.

We have an example of having done this year 10 of the Nuggets' 41 home games. Those 10 games averaged at the gate more than the other 31 Nugget games did which were not on home TV. You know, I think that the sports owners are just going in the wrong direction here and in the process they are going to hurt the consumer.

Senator **Goldwater**. Howard, do you have any questions?

Senator **Cannon**. I am sorry I am a little late getting in.

Senator **Goldwater**. Do you have a statement you want to make?

Senator **Cannon**. Yes, I will make a brief statement. I see that Mr. Wasilewski is not going to be around with us too much longer from what I see, but I want to wish him very well. He has been very helpful to this committee over the years and worked very well with us and I want to wish him the very best.

I wonder if the provision of local broadcasting could be maintained if the must-carry rules by local cable television are eliminated?

Mr. **Wasilewski**. I think it would be a tragedy if the must-carry rules were eliminated. I think that it would be very hurtful to the local broadcaster and also to the local audience if the cable were not required to carry the local television broadcast signal.

Senator **Cannon**. What if the must-carry rule were eliminated and there was a provision for an AB switch that I have heard talked about?

Mr. **Wasilewski**. Well, yes, there is such a switch that is a possibility, but as a practical matter it is not used and is hardly ever installed. I think that it would in effect not be the solution to the problem, Senator.

Senator **Cannon**. I would just like to say that we did introduce another bill yesterday and I hope that you will have a chance to look at it. We are trying to see if we can't work out something to come out with a good bill that will be reasonable to the industry and to everyone involved between Senator Goldwater's bill and the bill that Senator Hollings and I put in yesterday. So we would appreciate your taking a look at that and giving us your views on it and we would be glad to hear from you.

Mr. WASILEWSKI. Thank you, and thank you for your kind comments, sir.

Senator GOLDWATER. Well, thank you very, very much. It is a pleasure to have you here. But I still don't know how the hell the Nuggets beat the Suns. We were two ahead when I left home.

Ms. REYNOLDS. You won.

Senator GOLDWATER. Oh, we won.

Ms. REYNOLDS. Yes, sir.

Senator GOLDWATER. Oh, well, good.

Ms. REYNOLDS. I wouldn't want my testimony to be incorrect on that particular issue, Senator.

Senator GOLDWATER. Oh, I thought you said you creamed us.

Ms. REYNOLDS. No, you got us. We had a fine season and if we had to lose, better to Phoenix than anyone else.

Senator GOLDWATER. We won't take as much of your water now. Thank you very much.

The next panel will be Mr. Bowie Kuhn, commissioner of baseball; Mr. Robert Wright, president of Cox Cable Communications, Inc.; Mr. David Stern, executive vice president of the National Basketball Association; Mr. William Bresnan, president of the Teleprompter Corp.; and Mr. Robert Rosencrans, president and chief executive officer of Rogers UA Cablesystems, Inc.

Gentlemen, will you please be seated.

I think you heard me relate the story about these little lights, but we will put every one of your statements in the record. We would like to stay as close to the 5-minute rule as we can, but we recognize sometimes that is impossible.

We will start off with Mr. Kuhn, commissioner of baseball.

STATEMENTS OF BOWIE K. KUHN, COMMISSIONER OF BASEBALL; ROBERT C. WRIGHT, PRESIDENT, COX CABLE COMMUNICATIONS, INC.; DAVID J. STERN, EXECUTIVE VICE PRESIDENT OF THE NATIONAL BASKETBALL ASSOCIATION; WILLIAM J. BRESNAN, PRESIDENT, TELEPROMPTER CORP.; AND ROBERT M. ROSENCRANS, PRESIDENT AND CHIEF EXECUTIVE OFFICER OF ROGERS UA CABLESYSTEMS, INC.

Mr. KUHN. Good morning, Mr. Chairman. I want to thank you for the opportunity to appear here, and Senator Cannon, good morning to you.

I particularly want to talk about section 616, which is the sports provision of S. 2172. Of course, it is of enormous importance to professional sports.

Let me ask at the beginning: What does section 616 do? I think there has been considerable misunderstanding, Mr. Chairman, about the effect of this paragraph.

What it does is create a 50-mile zone around professional sports franchises in which the cable systems can bargain with the sports franchise for the right to carry the distant telecasts of members of the same league.

In other words, what it really does is to create in this limited territory a free market. In these 50-mile areas cable would bargain in the marketplace with the sports franchises for the right to import telecasts of other league members.

There has been the suggestion, and I have heard it around the halls, that the effect of this provision would be to preclude the superstations, for instance, from being able to carry, as they have in the past, professional sports programing. It really would knock them out, so runs the argument.

Mr. Chairman, let me say that I think this is utter nonsense. It is a contrived argument designed to destroy section 616. I have appeared before the Congress for many years arguing in support of sports provisions similar to section 616, as the chairman knows, and I must say that is the first time I have ever heard that argument advanced. Clearly this is a contrived argument which is designed just to achieve a purpose and effect at this particular posture of the subcommittee's deliberations.

Let's look at a comparable situation so that we can demonstrate that there would be no knocking out of the superstations by section 616. The comparable situation is U.S.A. Cable Network, which is a national cable network reaching some 10 million homes in the United States. They have contracts to carry the games for professional baseball, professional hockey, professional basketball, and other sports as well.

In our contract with U.S.A. Network and in the other leagues' contracts—with some modest exceptions—there are 50-mile blackout provisions exactly as there are in section 616. U.S.A. Network is able to operate a very effective network utilizing the restrictions of that 50-mile provision; it reaches millions of homes successfully and profitably with such a system. And they are very pleased to be able to make the deal with baseball and the other sports, to have a contract of this kind even with the restricted provision that it has.

Now what is more, Mr. Chairman, just as under section 616, the local baseball teams have the ability under our contract to bargain with U.S.A. Network—to get exceptions and to permit the U.S.A. games to come into their territories. They do deal with U.S.A. Network and many of our teams do permit U.S.A. Network to come into their markets. Clubs as diverse as Atlanta, Philadelphia, San Diego, Baltimore, Boston, Minnesota, Seattle, and Texas have permitted U.S.A. Network to present games right in their home territories.

So the notion that you would not get permission from the clubs to permit the superstations to come in if section 616 were adopted is just contrived and palpably wrong on the face of the argument.

I should say further that U.S.A Network, in reaching 10 million homes, does not reach nearly as many homes as is reached by, say, the superstation WTBS, which reaches some 21 million homes. If you made the wild assumption that, under section 616, WTBS would be eliminated from all of the major league markets, nonetheless, WTBS would have many more homes than U.S.A. Network reaches with its present hookup. In other words, you might have 15 or 16 million homes still being reached, and there is no earthly reason to believe that that kind of a hookup would be destroyed even if you couldn't bargain for the right to come into the major league territories—even though there is every indication that the cable system could bargain.

I might say further, Mr. Chairman, as to over the air, that many of our clubs are permitted to come into the territory of other clubs. For instance, Houston has over-the-air telecasts in Dallas and Dallas in Houston, Montreal in Toronto, and Toronto in Montreal. So there is nothing uncommon about this kind of arrangement occurring in professional sports today.

I want to stress, Mr. Chairman, that professional sports have many problems today—they are struggling economically. We are up against the giants of the cable industry.

I urge you gentlemen to appreciate the posture and problems that professional sports have. They are very serious. We need help. We wouldn't be here belaboring you with our arguments if that were not so. We believe that there is no risk to the existing system if section 616 were included in the bill, as I hope it will be.

Thank you very much for your time and attention.

[The statement follows:]

STATEMENT OF BOWIE KUHN, COMMISSIONER OF BASEBALL

Mr. Chairman, I am Bowie K. Kuhn, the Commissioner of Baseball. I appreciate the opportunity to testify before your Subcommittee concerning S. 2172, the "Cable Telecommunications Act of 1982," which has been sponsored by you and Senator Kasten.

I am here today specifically representing Major League Baseball. However, the views that I will present are supported by the other major professional sports leagues—the National Basketball Association, the National Hockey League, the North American Soccer League and the National Football League. They share our conviction that the professional sports clubs must be afforded some significant measure of control over the distribution of their telecasts by cable systems—a right which is provided in Section 616 of S. 2172.

As I will explain during my testimony, Mr. Chairman, there is simply no reason why the extraordinarily successful cable industry should not bear the obligation of entering into a free marketplace to bargain for the acquisition of distant signal professional sports programming—particularly since it has repeatedly advocated a free marketplace for the sale of its services. Moreover, there are compelling reasons for not granting cable an exemption from this marketplace. Continuation of this exemption will likely lead to a significant lessening in the amount of professional sports programming currently available on free over-the-air television.

I. Summary of position—professional sports clubs should have the fundamental entrepreneurial right to control the distribution of their telecasts by cable systems and to bargain with cable in a free marketplace; at the very least, they should have the limited right of control afforded by section 616.

Mr. Chairman, the professional sports leagues strongly support Section 616 of S. 2172. This amendment to the Communications Act would afford the professional sports clubs a limited right of control over the distribution of their telecasts by cable systems. Specifically, it would prohibit cable systems from retransmitting into any area within 50 miles of a professional sports club's home stadium the distant signal telecasts of another league member—unless they obtain the consent of the home club or its designee.

Section 616 would correct one of the most serious problems which confronts the professional sports clubs today. Indeed, absent the restrictions imposed by Section 616, there is virtually no limit to the literally hundreds of distant signal professional sports telecasts that cable systems might unload in those major urban markets upon which the professional sports club depend for their existence. Such home territory protection is especially critical to the Major League Baseball clubs, which currently derive some 75 percent of their revenues from gate receipts.

Section 616 also has an analogue in the current marketplace. During the past four seasons, Baseball has negotiated with the USA Network the right to present to cable systems a Thursday Night Game-of-the-Week package; because the agreement involves cablecasts rather than the imposition of distant signal over-the-air telecasts, cable systems do not have a compulsory license under the Copyright Act to carry the Thursday night games. Pursuant to our agreement, the USA Network does not authorize cable systems located within a baseball club's home territory to carry the Thursday night cablecasts unless they obtain the consent of that club; clubs have granted their consent in return for payment of an appropriate rights fee. Other professional sports leagues have reached a similar agreement with the USA Network. Obviously, the USA Network, which now serves over 10 million cable households, and the cable industry have been able to function quite successfully with the very same type of restrictions that Section 616 would impose on distant signal telecasts of professional sports events.

While Section 616 is sound, necessary and practical, Mr. Chairman, it does not completely address the inequities of the existing situation. The fundamental unfairness will continue unless professional sports clubs are afforded control over the distribution of their telecasts—a right which is denied them by virtue of the compulsory licensing provisions of the Copyright Revisions Act of 1976, 17 U.S.C. § 111, and a right which they possess in dealing with all other communications media, such as the USA Network.

Live sports telecasts are unique among all programming fare. They are current, topical, and ephemeral; unlike most other programming which can be shown time and time again, and from which revenues can be derived repeatedly, a live sports telecast has little or no value after the game is played. Accordingly, throughout the decade-long debate on the copyright revision legislation, the sports leagues maintained that compulsory licensing is inappropriate for sports telecasts. The leagues were never a party to, and indeed steadfastly opposed, the compulsory licensing compromise between the Motion Picture Association of America and the National Cable Television Association which was incorporated into the 1976 Act. Once again, the professional sports leagues have been excluded from the compromise embodied in a copyright bill which recently was reported out of the House Judiciary Committee (H.R. 5949). This compromise maintains compulsory licensing and protects the interests of every party affected except professional sports.

For a number of years prior to the passage of the 1976 Act, bills to provide for a comprehensive revision of the copyright laws exempted professional sports from compulsory licensing. Those responsible for this exclusion correctly recognized that sports programming deserves "special consideration" because of its unique ephemeral nature and because "Unrestricted secondary transmissions by CATV of professional sporting events could seriously injure the property rights of professional sporting leagues in televising ther live sports broadcasts. Unregulated retransmissions of live sports events could also have serious consequences on gate attendance, such as major and minor league baseball games."[1]

These legitimate concerns are, of course, essentially the same as those which led Congress to enact the Sports Broadcast Act of 1961, 15 U.S.C. §§ 1291 et seq. Ultimately, however, the sports issue was seen as one centering on communications, not copyright, policy; thus, it was determined that any statutory resolution of the issue should be the responsibility of the Commerce Committee.[2]

We are most grateful, Mr. Chairman, that you have accepted this responsibility and that you have sought to achieve a fair resolution of the competing concerns in S. 2172. It is particularly appropriate that you have done so because the severe problems which confront sports are in large measure attributable to recent, and dramatic, communications developments—specifically, the FCC's deregulation of cable and the development of satellite-delivered "superstations" with their extensive amounts of professional sports telecasts.

In sum, Mr. Chairman, we strongly endorse the provisions in S. 2172 which would afford professional sports clubs some limited measure of control over the distribution of their telecasts. However, our judgment continues to be that we should not be compelled by the Government to make any of our telecast available to cable; we should certainly not be required to do so at the de minimis price which is fixed by statute and which bears no relationships to the true marketplace value of our product.

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[1] Senate Judiciary Committee 93d Cong., 2d Sess., "Draft Report to Accompany S. 1361" at 33 (1974); Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee 91st Cong., 1st Sess., "Draft Report to Accompany S. 543" at 29 (1969).

[2] S. Rep. No. 94-473, 94th Cong., 1st Sess. 80 (1975).

As you know, Mr. Chairman, we are not alone in our belief that compulsory licensing should be eliminated in favor of a free marketplace. The same position has been espoused by the Chairman of the Federal Communications Commission; the Justice Department; the Register of Copyrights; the former and current heads of the National Telecommunications and Information Administration of the Department of Commerce; the past Chairman of the Copyright Royalty Tribunal; and others.[3] In doing so, these eminent authorities have focused in part upon the "anomalies" and "unique problems" that compulsory licensing poses for sports; they have also recognized the unavoidable consequence of maintaining without change the current system of compulsory licensing for sports telecasts—the potential reduction in the significant amount of such telecasts currently available on free, over-the-air television. Certainly, there can be no stronger evidence of the need to reappraise the current system than the recommendations of these individuals who have absolutely no economic stake in the controversy.

II. Basis for position

A. CONTINUATION OF THE COMPULSORY LICENSING SCHEME WILL SEVERELY IMPACT THE PROFESSIONAL SPORTS LEAGUES AND WILL ULTIMATELY LEAD TO A LESSENING OF THE AMOUNT OF LIVE PROFESSIONAL SPORTS PROGRAMMING ON FREE OVER-THE-AIR TELEVISION

The cable industry has sought to defend compulsory licensing on the ground that it is necessary to ensure cable's continued access to distant signal programming. It is undeniable that mandatory licensing results in the approximately 29 percent of the nation which currently subscribes to cable being glutted with an overabundance of distant signal sports telecasts. The ultimate effect of Government-mandated licensing of sports programming, however, will likely be a reduction in the amount of such programming which is currently available over free, conventional television to the entire American public—more than 70 percent of which does not currently have access to, or cannot afford, cable television.[4]

The likely effect of compulsory licensing on the continued supply of over-the-air sports programming was well stated in one recent independent study: "*The compulsory license for cable systems threatens to destroy the traditional television distribution market for sports.* In the short term, it denies consumers programs which are not made available to some broadcast stations in order to prevent cable systems from distributing those programs in other markets. In the long term, as full liability media increase their coverage, the compulsory license could induce programmers to withhold sports events altogether from broadcast stations (and thereby from traditional cable subscribers) in favor of pay cable, STV, MDS and other full liability alternatives."[5]

The Justice Department, in its March 20, 1982 letter to Congressman Rodino, likewise notes that, unless compulsory licensing is eliminated, "program producers may opt for distribution technologies that provide more control over use that broadcasting." Similarly the Commerce Department's NTIA has urged elimination of compulsory licensing, noting in part that:"*[S]ports programmers may be compelled to withhold their events from broadcast stations in favor of distribution mechanisms offering more control*—full copyright liability through pay cable, multipoint distribution service or STV, with the possible net effort of denying rather than affording viewers more program choice." [6]

There have already been instances where compulsory licensing has resulted in sports clubs not making certain of their telecasts available to free television.[7] If the current system of mandatory licensing is perpetuated, I fear that these instances will multiply. Your legislation, Mr. Chairman, is necessary to preserve free over-the-air television as a feasible marketing and revenue producing medium for the professional sports leagues. Absent such legislation, the leagues will, in all likelihood, be driven to reduce the significant number of their games presently available on free television. This is a result which professional sports leagues earnestly desire to avoid. But, as I will detail below, the factors which will force that alternative upon the leagues are quite compelling.

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[3] See, e.g., Besen, Manning & Mitchell, "Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem," 21 J. Law & Econ. 67 (1978); Shooshan & Jackson, Inc., "Cable Copyright and Consumer Welfare: The Hidden Cost of the Compulsory License" (1981); Brotman, "Cable Television and Copyright: Legislation and the Marketplace Model," 2 J. Comm. & Ent. L. 477 (1981).

[4] (Even by the end of 1986, estimates are that some 61 percent of the total U.S. households will not be wired for cable.) Department of Commerce, U.S. Industrial Outlook—1982 at 369 (1982).

[5] See Shooshan and Jackson, supra note 3, at 55 (emphasis added).

[6] NTIA, "Cable Copyright: Alternatives to the Compulsory License" at 31 (December 1981) (emphasis added).

[7] See Shooshan and Jackson, supra note 3, at 55.

1. Compulsory licensing deprives professional sports clubs of the fundamental entrepreneurial right to control the distribution of their own product

In addition to some 90 network telecasts over ABC and NBC, the Major League Baseball clubs present each season nearly 1,600 telecasts over their local "flagship" stations.[8] Many of these same telecasts are also carried by the approximately 125 broadcast stations which comprise the clubs' regional networks and which are licensed to the nation's smaller and medium-sized communities. The other professional sports leagues also present a substantial number of telecasts over the national networks and/or local television stations.

Under the current statutory and regulatory arrangements, cable has been able to expropriate each of these telecasts and to carry the programming across the country without the consent—indeed over the objections—of the clubs concerned. The professional sports clubs have thus lost all semblance of control over the distribution of the product which they themselves have created.

Surely no one would suggest that a columnist who sells an exclusive story to the New York Times should be required, over his objection or that of the Times, to provide that story for a token fee, established by Government fiat, to the Washington Post or to newspapers in other cities. Nor could anyone seriously suggest that, because the Boston Red Sox licensed exclusive television rights to a Boston television station, an over-the-air broadcaster in another city should have the right to carry these telecasts without obtaining the consent of the Red Sox.

These traditional concepts of private property have, however, been unjustifiably and unfairly discarded for the sole benefit of the cable television industry. The current system allows the cable industry to deprive professional sports clubs and other program suppliers of the basic rights of any entrepreneur who has invested substantially and with great personal risk in the creation of a product—the rights to control the distribution of that product and to negotiate with those who seek to profit from the use of that product. These fundamental rights can be fully protected only when the clubs place their games on pay cable, basic cable or subscription television.

Consider, for example, the situation of the New York Mets, who have recently negotiated a 30-year contract with a packager of sports cablecasts. Under this contract the Mets may make an increasing number of games available for distribution by the packager to cable systems. No one may retransmit these cablecasts without bargaining in the marketplace for their use. The Mets are thus able to control the distribution of their cablecasts and to negotiate a fair marketplace price for them. On the other hand, the Mets do not have this right with respect to each game that they place on WOR-TV, their current over-the-air flagship station. Without obtaining the consent of the Mets (or WOR), a so-called "resale carrier" thrusts the Mets over-the-air telecasts onto satellite and then sells these telecasts to cable systems located throughout the United States, including those in areas where the Mets may desire to market or not to market their product. Obviously, in determining the number of games to place on cable versus free television, there is a growing and natural incentive for the Mets, and other clubs, to choose the distributional medium which affords them the right of control.

2. Compulsory licensing permits cable to expropriate sports programming in a way which is destructive of the very concept of a professional sports league

Current statutory and regulatory arrangements do not only deprive the professional sports clubs of their basic entrepreneurial rights. They also permit cable to expropriate the clubs' telecasts in a way which maximizes cable's profits, but is squarely contrary to the best interests of the clubs themselves. As the Register of Copyrights has correctly explained: "[C]able importation of league sporting events broadcasts on distant signals may undercut the home gate, the value of broadcast rights, and fan loyalty of another member club located in the same area as the cable system. The [Copyright] Office has concluded that adequate protection should [therefore] be afforded to sports leagues to minimize this potential damage."[9]

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[8] Baseball's 1982 schedule of local club telecasts is attached as exhibit 1. (Retained in committee files.)

[9] Statement of the Register of Copyrights before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice at 66 (July 15, 1981).

The Commerce Department's NTIA has similarly observed: "*[S]ports telecasts stand apart from other commercial programming in that value is diluted by competing sports programming more than is nonsports programming.* First, a sports event has little or no 'replay' value. Second, a telecast of a local game attracts fans who might otherwise have attended; telecasts of other, more attractive games simultaneously with the playing of a home game similarly attract audiences and thereby potentially reduce gate related revenues, and also threaten local fan loyalties. Third, the well-being of any team depends on the well-being of the league and the viability of its competitors. Unrestricted telecasts of popular matches could diminish fan interest in weaker, local teams and regional matches." [10]

A sports club cannot exist unless it successfully cultivates the loyalty and support of its hometown fans. It depends upon these local fans to come to the ballpark and to view the club's games over television. As noted, almost three-quarters of a Major League Baseball club's revenues are derived from gate receipts and from expenditures at the ballpark; an additional 13 percent comes from a local broadcast revenues—obviously all of this is attributable to the local fan. A professional sports club (unlike other program suppliers) typically has one chance and one chance only to attract such fans to its games and thereby reap a financial reward for its labors—and that is at the very time that the game takes place.

It is difficult enough for many clubs to attract fans and thereby maximize their limited opportunity to reap a financial reward. The process, however, becomes even more troublesome when cable systems import into a club's home territory literally hundreds of distant signal telecasts of other league members. Such oversaturation is no longer a mere possibility, but a concrete and troubling reality.

For example, the cable operator that recently was awarded the Boston franchise has promised to import some 600 distant signal baseball telecasts each season; this amounts to more than 3 telecasts each and every day that the Red Sox attempt to attract fans to one of their home games or viewers to one of their telecasts. Consider also the Los Angeles cable operator which attempts to sell subscriptions to his system, claiming: "For the first time you'll have a chance to see 400 major league games from everywhere! Both leagues, all 26 teams. And all the action, complete and live, as it happens. It's Theta's biggest baseball season! And you can reserve your box seat now by installing Theta Cable TV." [11]

There have been a number of dramatic developments which have occurred subsequent to passage of the 1976 Copyright Act, and which have resulted in situations such as these. For example:

Historically, cable systems served only those rural and mountainous areas which lacked adequate television reception. Recently, however, cable has become convinced that there is a pot of gold in every major urban market—the very areas upon which the clubs depend for gate and broadcast revenues. Indeed, each of the markets with a Major League Baseball franchise is now in one stage or another of the cable franchising process.

As explained below, the FCC has all but completely deregulated the cable industry. Most significantly, it has within the last year removed all restrictions on the total number of distant signals that cable systems may import. The result is that there is no significant regulatory limit on the vast amounts of distant signal sports programming available for importation.

Perhaps most important, however, has been the development and growth of the satellite-delivered superstations with their significant amounts of professional sports programming.

In late 1976, after passage of the Copyright Act, Station WTBS-TV in Atlanta was placed on satellite. Today, WTBS reaches a phenomenal 20,375,000 subscribers—67.7 percent of the nation's cable households and some 25 percent of the nation's television households. [12] Two other stations, WGN-TV (Chicago, Illinois) and WOR-TV (New York, New York), have also been placed on satellite. These signals reach some 8.2 million and 4.9 million homes respectively. [13] A prime characteristic of each of these stations is that it is a flagship not only of a Major League Baseball club, but of other professional sports clubs as well:

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[10] NTIA, "Cable Copyright: Alternatives to the Compulsory License" at 28 (December 1981) (emphasis added).

[11] The above is taken from an advertisement which Theta cable placed in the April 5, 1981 Los Angeles Times, a copy of which is attached as exhibit 2. (Retained in committee files.) Theta Cable serves some 100,000 subscribers in Los Angeles and is wholly-owned by Westinghouse, the Nation's second largest multiple system operator.

[12] Multichannel News, March 29, 1982 at 4.

[13] Cablevision Magazine, April 26, 1982, at 248.

Professional sports teams currently on satellite-delivered superstations

Superstations and teams:	*Annual telecasts*
WOR-TV:	
Mets (baseball)	100
Knicks (NBA)	29
Nets (NBA)	21
Islanders (NHL)	23
Rangers (NHL)	33
Cosmos (NASL)	15
WGN-TV:	
Cubs (baseball)	149
Bulls (NBA)	22
Sting (NASL)	9
WTBS:	
Braves (baseball)	120
Hawks (NBA)	47

Mr. Chairman, the professional sports interests have had over 30 years of experience dealing with conventional television. It is this experience which convinces us of the harm posed by the uncontrolled importation of such large numbers of competing telecasts. If we could successfully function with the clubs invading each others' home markets with their telecasts, we would have long since changed our telecasting patterns to take advantage of the additional revenues which this extraterritorial telecasting would provide. However, as we have understood for years, the introduction of substantial amounts of competing telecasts over either conventional television or cable television poses a serious threat to the very determinants of a club's success—to the following of its hometown fans as that is reflected in the size of its gate and the value of its broadcast rights.

The weaker teams in particular are susceptible to the potentially devastating effect of having their home territories saturated by a glut of sports telecasts from distant markets. And, as Congress concluded when it passed the Sports Broadcast Act of 1961, 15 U.S.C. § 1291 et seq., "Should these weaker teams be allowed to flounder, there is danger that the structure of the league could become impaired and its continued operation imperiled." [14]

Compulsory licensing unfairly deprives the sports clubs of the right to receive a fair marketplace value for their telecasts from cable systems.

There is no question that the cable industry derives a substantial economic benefit from distant signal sports telecasts. In the Spring of 1980 Arbitron, one of the nation's leading market research firms in the communications industry, conducted a survey to determine, among other things, the reasons why people subscribe to cable. Arbitron found that somewhere between 30 to 50 percent of the responding households listed distant signal sports as a principal reason for subscribing to cable.

The cable industry recognizes the immense value of distant signal sports programming in attracting and maintaining subscribers. This is perhaps best illustrated in the promotional material which is used to market superstations. Typical of the statements made are the following which have been extracted from the promotional material attached as Exhibit 3. (Retained in committee files.)

"Nothing Sells Cable Like WGN Sports.

"Recent research studies conducted all over the U.S. prove that WTBS has the highest national viewership of any basic service. Why? One reason is no other general entertainment network in America has more sports programming then WTBS, The Super Station. On an average day, we present a minimum of 1.5 hours of sports.

"But it's obvious our programming makes WOR the superstation your subscribers want because we have more movies, more sports, and less reruns.

"A very appetizing programming menu, filled with movies and sports, is why WOR-TV turns America on 24 hours a day.

"Your subscribers, present and future, are going to love you for including WOR in your programming schedule. * * * For two reasons: movies and sports. WOR is heavy on both and statistics show they're the two primary reasons televison viewers subscribe to cable TV.

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[14] H.R. Rep. No. 87-1178, 87th Cong., 1st Sess. 3 (1961); S. Rep. No. 87-1087, 87th Cong., 1st Sess. 2 (1961).

"We're mostly sports and movies, because that's what you want for your subscribers.

"Although movies and sports are mainstays of [WTBS'] programming, Channel 17 has built a solid record with other types of programming as well."

It is hardly suprising, therefore, that cable systems have consistently selected professional sports flagship stations as their distant signal offerings. Only 58 of the over 700 U.S. television stations are professional sports flagship stations. Yet, by the end of 1979 (the most recent year for which we have compiled such statistics) some 90 percent of the cable systems with more than $3,160,000 in semi-annual gross receipts imported one or more of these 58 stations.

Nevertheless, the Government-prescribed royalty fees which cable systems pay to retransmit distant signal sports programming bear no resemblance whatsoever to the marketplace value of this programming. Indeed, in 1979 (the most recent year for which the Copyright Royalty Tribunal has allocated royalties) some 4,000 cable systems paid approximately $15.8 million in royalties for their distant signal programming.[15] The Copyright Royalty Tribunal allocated only 15 percent of this pool for all professional and collegiate sports telecasts. What this means is that an average cable system importing some 200 live sports telecasts would have paid in 1979 less than $3 for each one of these telecasts.[16] By way of comparison, individual television stations may pay tens of thousands of dollars for the right to televise a single regular season professional sports event locally, while a national network telecast of such an event may command hundreds of thousands of dollars.

In short, compulsory licensing does not only deprive the sports clubs of all control over their product and in a way which jeopardizes the ability of the clubs to function successfully. It also requires the clubs to give their product away for a pittance which has no relationship to the true marketplace value of the club's product to cable. For the professional sports leagues, the principal issue is one of control, not compensation. However, the lack of adequate compensation serves to underscore the gross inequity of the current situation and further prompts the need for corrective action.

B. THERE IS ABSOLUTELY NO JUSTIFICATION TODAY FOR COMPULSORY LICENSING OF PROFESSIONAL SPORTS PROGRAMMING

During his testimony before the Senate Judiciary Committee last Spring, the Register of Copyrights came to the unqualified conclusion that compulsory licensing of distance, nonnetwork programming should be eliminated, explaining: "A compulsory license mechanism is in derogation of the rights of authors and copyright owners. It should be utilized only if compelling reasons support its existence. Those reasons may have existed in 1979. They no longer do." The Register's remarks are particularly apropos when one considers the plight of sports.

1. *Compulsory licensing requires professional sports clubs, which typically enjoy only marginal economic success at best, to provide an enormous subsidy to the cable industry, which has become dominated by some of the nation's largest and most profitable conglomerates*

It is quite clear that complusory licensing requires the sports interests to subsidize the cable industry—a Government-established price tag of approximately $3 per telecast per system supports no other conclusion. It is simply wrong, Mr. Chairman, to require professional sports to provide such an enormous subsidy to any private profit-oriented enterprise. But the absolute absurdity of it all is that the major recipients of these "contributions" are not small, struggling operations; to the contrary, they are the large, immensely successful communications conglomerates that now dominate the cable industry, entities such as [17] Westinghouse, which has recently purchased the nation's second largest multiple system operator (MSO), Teleprompter, for an estimated price of $646 million.

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[15] See Statement of Register of Copyrights before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice at 17 (July 15, 1981).

[16] The average cable system paid $3,950 ($15,800,000 divided by 4,000) for all of its distant signal programming. The sports' share of the $3,950 amounts to $593 (15 percent of $3,950). If a system imports 200 sports telecasts, the average price per telecast is $2.97 ($593 divided by 200.) The average cable system, which in 1979 imported 5 distant signals, would likely have imported more than 200 sports telecasts, thereby making the price per telecast even lower; indeed, any one of the satellite-delivered superstations typically presents more than 200 sports telecasts each year.

[17] The MSO rankings are as of August 31, 1981 according to Warburg Paribas Becker, Inc. "Five-Year Performance Survey of the Cabe TV Industry" at 12 (December 1981).

Time, Inc., which in 1978 bought American Television and Communications, for $179.6 million, and which has more recently purchased Midwest Video, to become the nation's largest MSO.

The Times-Mirror Company, which has become the nation's seventh largest MSO after purchasing Communications Properties, Inc. for $128 million.

American Express and Warner Communications, which entered into a joint venture to become the nation's fifth largest MSO.

The New York Times, which purchased a chain of cable systems in New Jersey for $119 million.

And a number of other major corporations, including Viacom International (ninth largest MSO), General Electric (fourteenth largest), Sentry Insurance (twenty-sixth largest), Cox Broadcasting (fourth largest), and Storer Broadcasting (sixth largest).

The domination of the cable industry by these corporate giants is beyond question. Industry sources disclose that the 25 largest MSOs control some 64 percent of all cable subscribers in the United States; just the top 10 control 40 percent of these subscribers.[18]

It is not surprising that such prominent business concerns have rushed to take over the cable industry. According to the FCC's most recently available financial data, the cable industry had a pretax net income in 1980 of nearly $170 million—notwithstanding the substantial amounts that it recently has had to invest to wire the major urban markets. This $170 million figure represents a huge increase over the approximately $27 million in net income that the cable industry had in 1975, just before Congress enacted the compulsory licensing scheme.[19] Cable's financial future looks even more promising. Industry observers predict that cable's revenues will increase from 1981's $4 billion to $28 billion in 1990.[20]

These glowing financial reports for the cable industry present a striking contrast to the situation of Major League Baseball.

In 1980, when the cable industry enjoyed a profit of some $170 million, only 8 of the 26 Major League Baseball clubs earned a pretax profit. Moreover, the 18 clubs that lost money in 1980 lost considerable sums: A combined total of approximately $41 million, or an average loss of over $2 million per club. Balancing the losers with the profitable teams in 1980 shows an estimated net pretax loss of about $26 million, a net loss figure that I believe dwarfs any prior loss sustained by baseball.

Baseball's financial performance in 1980 is not atypical. The Cambridge Research Institute (CRI) has recently completed and published a study which reflects that baseball lost money every year from 1974 through 1979, except in 1978 when the industry made $5,000. The performance record for the individual clubs is consistently depressing: In 1974, only 7 of 24 clubs showed an operating profit; in 1975, 10 of 24; in 1976, 7 of 24; in 1977 11 of 26. More recent baseball data show that trend has continued—in 1978, 12 of 26 clubs made money on their baseall operations. CRI concluded that even with respect to the most profitable clubs, there was "a relatively mediocre rate of return by most industry standards."

The question must be asked, Mr. Chairman: What justification can possibly exist for requiring business concerns which enjoy only marginal economic results, such as the Major League Baseball clubs, to subsidize some of the most successful of the Fortune 500 conglomerates? We submit that there is no basis, in reason or equity, to permit these corporate giants to expropriate the property of professional sports clubs pursuant to a compulsory licensing scheme. Cable is no longer a fledgling, "mom and pop" industry; it should no longer be treated as such at the expense of the professional sports interests.

2. Compulsory licensing of sports programming can no longer be rationalized on the basis of heavy FCC regulation of the cable industry

Congress imposed a compulsory license in part to counteract heavy FCC regulation of the cable industry.[21] However, the regulatory picture, and thus one of the prinicpal underpinnings of compulsory licensing, has changed drastically since the passage of the 1976 Act.

(a) The FCC has eliminated virtually all of its significant cable regulation.

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[18] NTIA, "Cable Copyright: Alternatives to the Complusory License at 19 (December 1981).

[19] NTIA, "Cable Copyright: Alternatives to the Complusory License at 19 (December 1981).

[20] "Multichannel News", April 19, 1982, at 8.

[21] In its report accompanying the copyright legislation, the House Judiciary Committee noted: "[Any] statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry." H.R. Rept. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

During the several years since the Congress considered the copyright revision legislation, the FCC has, for example: Deleted its "leapfrogging" rules, which prevent cable systems from importing independent television signals from any but the two closest television markets; exempted cable systems with less than 1,000 subscribers from essentially all regulation; eliminated the process by which it certified cable operations, thereby allowing cable systems to switch from one sports station to another on a seasonal, monthly and even daily basis; eliminated its rules setting forth minimum franchise requirements; expanded the categories of television signals which cable systems need not delete under the network nonduplication rules; eliminated virtually all restrictions on the licensing of earth stations, which are used by cable systems for the reception of television signals from satellites; as a result of court action, deleted its rules requiring cable systems to afford the public and others access to their facilities and imposing upon cable systems minimal channel capacity requirements; as a result of court action, deleted its rules restricing the amount of sports and other programming available to pay cable.

Most importantly, a four-to-three majority of the FCC recently voted an end to virtually the last vestiges of cable regulation—the signal carriage and syndicated exclusivity rules. The result of that narrow vote, which became effective last July, is that cable systems may now carry any syndicated programming they wish without regard to the exclusivity arrangements for which syndicators and broadcasters have baragined in the marketplace. Even more significant from sports' standpoint is the elimination of the distant signal restrictions, which will mean that cable systems may expropriate as much of the sports product as they wish—subject only to the minimal, and wholly inadequate, restrictions of the sports rule discussed below. Indeed, recognizing the immense value of live sports programming, cable systems may soon attempt to "cherry pick" this programming from a variety of television stations and to offer a single channel of highly desirable sports events.

In proposing the elimination of the signal carriage and syndicated exclusivity rules, the FCC relied upon a number of studies that purportedly gauge the impact of this action on various parties. Significantly, the FCC studies fail even to mention, let alone discuss, the effect of eliminating these rules on professional sports. Although the leagues pointed out this glaring omission to the FCC, the FCC never undertook any separate study which attempted to assess the impact of its action on sports or the continued supply of sports programming over full television. As the commerce Department's NTIA has concluded, "[A]nomalous and potentially harmful effects of the compulsory license on the availability of sports programming are only exacerbated by removal of the FCC's distant signal importation restrictions."[22]

(b) The FCC has not regulated, in any meaningful fashion, the importation of sports telecasts.

As noted, the Congtress determined not to exclude professional sports programming from the compulsory licensing provisions of the 1976 Copyright Act because it considered the sports issue to involve communications policy. Resolution of the issue was committed to the FCC (which at the time was in the midst of a rulemaking concerning cable's importation of sports programming) and to the Commerce Committees.[23] As Senator Tunney noted, if the FCC's "rules appear to reflect an improper balance between the concerns of sports and CATV, the Congress could investigate and hold full hearings for remedial legislation."[24]

The FCC later adopted a rule which imposes some restrictions upon cable's importation of distant signal sports telecasts. 47 C.F.R. § 76.67. However, as the Register of Copyrights has testified before the Congress, the FCC's "Sports Rule" does not adequately protect the legitimate interests of sports clubs. It does no more than prevent cable systems located within 35 miles of the home team's community from importing 2½ hours of the distant signal telecast of a game involving that team—provided that the home team does not televise the game locally; provided that the cable system does not have less than 1,000 subscribers; provided that the distant signal is not "grandfathered" on the system; and provided that the team complies with all of the costly notice requirements adopted by the FCC.

As an illustration, if the Boston Red Sox were playing the New York Yankees in Boston, the only protection afforded is against the importation by Boston area cable systems of the signals from the Yankees' flagship station, WPIX-TV. These cable systems can still import the telecasts of games of any of the other 24 major league teams, as well as the telecasts of any Red Sox away games, thereby destroying the exclusivity granted to the Red Sox flagship station and affecting the Red Sox home gate. As noted above, the Boston cable operator boasts that he will import the telecasts of some 600 baseball games. Of this number, the Sports Rule does not require the deletion of a single telecast. Furthermore, the Sports Rule's ban on cable's importation of the home game extends only 35 miles. Thus, the distant signal telecast of the home game is available to cable systems in scores of suburbs within an easy hour's drive of the home stadium. Ironically, the Commission refused to extend the zone of protection beyond 35 miles primarily because its signal carriage rules—most of which it has since repealed—were geared to the 35-mile zone. See report and Order in Docket 19417, 54 F.C.C.2d 265, 282 (1975).

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[22] NTIA, "Cable Copyright: Alternatives to the Compulsory License" at 27 (December 1981).

[23] See S. Rep. No. 94-473, 94th Cong., 1st Sess. 80 (1975); S. Rep. No. 93-983, 93d Cong., 2d Sess. 132 (1974).

[24] S. Rep. No. 93-1035, 93d Cong., 2d Sess. 77 (1974) (minority views of Senator Tunney); 120 Cong. Rec. S16155 Sept. 9, 1974) (daily ed. remarks of Senator Tunney). *See Also* 120 Cong. Rec. at S16158 (daily ed. remarks of Senator Hruska).

When the Sports Rule was adopted, the National Cable Television Association conceded that it is reasonable. See Report and Order in Docket 19417, 54 F.C.C.2d 265, 281 (1975). The NCTA has most recently supported codification of the rule in H.R. 5949. To be sure, the Sports Rule affords a measure of relief which is important. But, as the Register of Copyrights has noted, this minimal protection is wholly inadequate and does not reflect that proper balancing of competing interests that Congress apparently envisioned when it last considered excluding sports programming from compulsory licensing. Significantly, the Commission's refusal to provide the full measure of relief sought by the sports leagues was attributable, in large part, to the Commission's view that it does not have juridiction to do so.[25]

(c) Notwithstanding its lip service to the concept of a free marketplace, the cable industry has successfully supported government intervention and regulation which suits its interests. At the same time that cable has waved the free merketplace banner to rid itself of FCC regulation, it has successfully sought government regulation which protects its interests. The FCC, for example, has insulated cable from the competition which would be posed by the phone company; in S. 2172 cable has sought statutory codification of this protection as well as protection against competition from foreign-owned and municipally-owned cable systems. Local authorities have given cable operators a natural monopoly over cable services in their franchise areas, while the FCC has placed a lid on the franchise fees which these authorities may exact—a maximum which the cable industry seeks to codify in S. 2172. And Congress, when it enacted the 1978 amendments to the Communications Act, authorized the FCC to protect cable systems by regulating the terms and conditions (including price) which could be imposed for pole attachments; this, of course, has resulted in cable's receiving a substantial windfall in the form of significantly reduced pole attachment payments.

But the most telling example of cable's on-again, off-again support for a free marketplace can be seen in its fervent desire to retain compulsory licensing—which is the antithesis of such a marketplace. As the Register of Copyrights testified, "It is reasonable to ask * * * how 'full and fair' * * * competition can be when, among all the program distribution services, cable television is the only one that stands outside the marketplace for a portion of its product."[26]

In short, we can understand, although we do not necessarily agree with, the original decision to award cable the compulsory licensing privilege in recognition of heavy FCC regulation of that industry. But we are at an absolute loss to comprehend the continued exemption of the cable indsutry from normal marketplace forces in light of today's virtually complete deregulation of that industry; the failure of the FCC to impose any meaningful restriction on the importation of distant signal sports programming; and the industry's successful support of regulation which protects cable. Quite simply, Mr. Chairman, we do not believe Congress ever intended that cable should have it both ways.

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[25] The Comission concluded: "Our responsibilities under the Communications Act to foster an efficient, nonnationwide communications service, compelled us to issue cable television signal carriage, program exclusivity and antisiphoning rules which we have determined will adequately protect the ability of television broadcast stations to serve the public. *We can find no public interest rationale in terms of our national communications policies for affording sports programming additionsl protection against audience fragmentation."* *Report and Order in Doc. No. 19417* 54 F.C.C.2d 265, 277 (1975) (emphasis added).

It should be noted that the various rules to which the Commission referred in the above passages have since been eliminated.

[26] Statement of the Register of Copyrights before the House Subcommittee on Courts, Civil Liberties and the Administiation of Justice at 53 (July 15, 1981).

3. Compulsory licensing of sports programming is unnecessary to ensure access to sports programming

Congress adopted a compulsory license scheme believing that it would be "impractical and unduly burdensome" to require cable systems to negotiate with copyright owners. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976). Cable also argues that compulsory licensing is necessary to insure its access to distant signal programming. Whatever the merits of the arguments in 1976, they are certainly not true today with respect to sports. Cable's experience in bargaining with the sports interests during the past several years conclusively demonstrates that there is no factual basis for the major underpinning of compulsory licensing.

For the fourth season in a row, Baseball has negotiated a contract with USA Network to distribute via satellite a game-of-the-week to cable systems across the country; the National Basketball Association, National Hockey League, North American Soccer League and other professional and collegiate sports interests also cablecast a number of their events over USA Network. Another cable program packager, the Entertainment and Sports Programming Network (ESPN), has contracted with professional, collegiate and amateur sports interests; it presents continuous sports programming to cable systems throughout the United States. USA Network currently reaches some 10.5 million cable subscribers, while ESPN reaches some 15.4 million.[27]

In addition, a number of individual professional sports clubs have successfully negotiated with cable systems:

Professional sports clubs with cable deals—1982

Club and cable packager:	*Number of games*
New York Mets, Sports Channel	50
Pittsburgh Pirates, Action TV	12
Philadelphia Phillies, Prism	30
Cincinnati Reds:	
Warner Qube	7
Reds on Cable	8
Chicago White Sox, Sportsvision	95
Cleveland Indians, Ten TV	26
New York Islanders, Sports Channel	59
New York Rangers, MSG Network	40
Buffalo Sabres, International Cable	53
Philadelphia Flyers, Prism	38
Hartford Whalers, Prism	25
New York Knicks, MSG Cable	40
New Jersey Nets, Sports Channel	40
Philadelphia 76ers, Prism	26
San Antonio Spurs, Rogers UA Columbia	24
Boston Celtics, Prism	25
Cleveland Cavaliers, Ten TV	50
Phoenix Suns, Arizona Sports Network	37
Seattle Supersonics, Sonics Super Channel	73

Moreover, more than 20 clubs have successfully negotiated arrangements with subscription television and MDS operations. They include the Los Angeles Dodgers, California Angels, Detroit Tigers, Cincinnati Reds, Texas Rangers, Chicago White Sox, Baltimore Orioles, Los Angeles Kings, Detroit Red Wings, New Jersey Nets, Los Angeles Lakers, Phoenix Suns, Dallas Mavericks, Boston Celtics, Cleveland Cavaliers, Denver Nuggets, Detroit Pistons, Golden State Warriors, Portland Trailblazers and Washington Bullets.

There is further evidence that the cable industry has the ability to bargain in the markeplace for sports programming, without the security blanket of a compulsory license. As discussed above, the cable industry has become dominated by some of the nation's largest corporate enterprises who surely, at the very least, are the equals of the sports clubs at the bargaining table. Indeed, many of these enterprises are already bargaining for sports programming through their broadcast subsidiaries; there is no reason whatsoever that they could not bargain for the programming on their cable subsidiaries as well. As the following chart illustrates, many of the clubs' "flagship" stations are owned by corporations with significant cable interests:

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[27] Cablevision Magazine, April 26, 1982, at p. 248.

PROFESSIONAL FLAGSHIP STATIONS WITH CABLE INTERESTS

Club, station, and corporate parent of station:
Chicago Clubs, WGN, Tribune Co.
Chicago Sting, WGN, Tribune Co.
Chicago Bulls, WGN, Tribune Co.
Denver Nuggets, KWGN, Tribune Co.
Colorado Rockies, KWGN, Tribune Co.
Pittsburgh Pirates, KDKA, Westinghouse.
San Francisco Giants, KTVU, Cox.
Boston Red Sox, WSBK, Storer.
Boston Bruins, WSBK, Storer.
Los Angeles Kings, KHJ, General Tire.
Los Angeles Lakers, KHJ, General Tire.
New York Cosmos, WOR, General Tire.
New York Mets, WOR, General Tire.
New York Knicks, WOR, General Tire.
New York Islanders WOR, General Tire.
New York Rangers WOR, General Tire.
New Jersey Nets, WOR, General Tire.
Boston Celtics, WBZ, Westinghouse.
Cincinnati Reds, WLWT, Multimedia.
Hartford Whalers, WVIT, Viacom.
Detroit Pistons, WKBD, Field Communications.
Chicago White Sox, WFLD, Field Communications.
Detroit Red Wings, WKBD, Field Communications.
Seattle Supersonics, KIRO, Bonneville International.
Utah Jazz, KSL, Bonneville International.

Can one believe that Westinghouse, which negotiated on behalf of station WBZ with the Boston Celtics, would not be able to negotiate on behalf of its cable operations as well?

The sports leagues are in business to do business; they cannot afford to ignore obvious and valuable business opportunities. The baseball clubs alone present nearly 1,600 broadcasts each season over conventional television (exhibit 1), as well as a number of others over cable and STV. As the Register of Copyrights testified before the Senate Judiciary Committee last year, "Cable is aggressively moving to satisfy the insatiable American appetite for sports. Its widening success belies the need for a compulsory license to supply sports programs." In short, when the marketplace has been left to function, there have not been any practical barriers to dealings between cable and the sports interests.

To be sure, the sports interests have sought to protect their home territories from oversaturation. Many clubs have refused to license any over-the-air telecasts of home games; others have licensed only a minimal number of such telecasts. (See exhibit 1.) Pursuant to the Sports Broadcast Act, the leagues have generally not licensed certain national telecasts within the clubs' home territories. And, as noted, the leagues have not authorized cable systems located within the clubs' home territories to present all of the USA Network Game-of-the-Week cablecasts, absent consent of the home club. The local broadcasters, networks, USA Network and cable systems have nevertheless all been able to function successfully. The cable industry would be able to function just as successfully if the professional sports clubs were afforded the limited rights of control provided in Section 616 of S. 2172. The ultimate result would be to preserve free television as a viable medium for the presentation of professional sports telecasts.

Senator GOLDWATER. This is, I think, one of the most important parts of this legislation and we are going to study it very deeply.

The next witness will be Mr. Robert Wright of Cox Cable.

Mr. WRIGHT. Thank you, Mr. Chairman.

I am Robert C. Wright, president of Cox Cable Communications, Inc., a company which owns and operates cable television franchises employing more than 4,000 people in 23 States.

Cox Cable provides home entertainment to more than a 1,200,000 households in rural and metropolitan America. We entered the cable television industry in 1962 and have the distinction of operating the Nation's largest cable television franchise, in San Diego, and the oldest, in Astoria, Oreg. We have an enviable record of developing franchises and meeting or exceeding franchise obligations.

Let me first observe that S. 2172 represents positive legislation to clarify the division of regulatory authority over cable television. A history of regulatory inaction followed by overregulation created substantial delays in the implementation of cable television service throughout the country.

The provisions of S. 2172 will create a much needed control over the growing web of municipal regulation. Cities today are attracted by the revenue growth of cable TV. The desire for greater municipal revenue has created a trend toward extensive municipal regulation of cable television and has the potential of severely curtailing the full development of our industry.

All too often the fragile nature of the cable television industry is not fully appreciated or understood. Revenues during 1981 were under $3.5 billion. The industry as a whole is smaller than CBS and cable television industry pay revenues collectively were less than the third-ranked NBC television network. A.T. & T. with $125 billion in assets, is 40 times greater than the entire cable television industry. Yet on the profits side we are often pictured——

Senator **Goldwater**. Just a moment. What is the total business of cable? Do you have a total on it?

Mr. **Wright**. It is a little less than $4 billion, about $3.8 billion in 1981.

Senator **Goldwater**. Thank you.

Mr. **Wright**. On the profits side we are often pictured as reaping huge profits. The fact is that most cable television companies have very little capital remaining after interest payments. I would estimate the industry will average less than 7 percent return on revenue and less than 12 percent return on investments during 1982. Total net profits in 1981 by my estimate probably do not exceed $250 million against $7 billion for A.T. & T.

Despite their size, cable television companies must make enormous capital investments in the communities they serve. In new, major markets, a cable operator must invest from $700 to $900 per subscriber to build a 54-plus channel system with two-way interactive capability. He must generate $25 to $30 per month in new systems simply to cover interests costs. The cable operator must do this while still competing with subscription television, multipoint distribution service, subscription master antenna television, direct broadcast satellite, video cassette recorders, free TV, radio, movies, and numerous other forms of home entertainment which are not subject to any local regulation, taxes, franchise fees, franchise renewals, et cetera.

The cable television operator must pay municipalities approximately 5 percent of gross revenues in order to use power and phone company easements granted many years ago. Normally those companies are protected from paying the city any fees for the same rights.

As an example, the STV service in Los Angeles has over 500,000 customers. It generates by my estimate approximately $125 million in revenue and is therefore three times larger than any cable system in existence. That system pays no franchise fees of any type nor is subject to any State or municipal regulation.

STV today is probably the fastest growing media. Senator, we are going into the STV business for the very reasons that I am voicing. The earlier speaker you heard from ATC is now one of the Nation's largest operators of STV, looking, I would assume, at the higher rates of return, less capital, and no regulation.

With these facts in mind, you can understand the cable operator's concern about escalating municipal regulation of cable.

Unrealistic economic demands from municipalities deter responsible bidders, and the ultimate victim is the public, which suffers delays in the institution of service or worse, inadequate service by companies which find they cannot implement a proposal that they had to accept as a condition of the franchise agreement.

Investment in a cable television franchise represents an enormous capital commitment. For example, Cox will invest almost $100 million in our franchise in New Orleans, which is a very significant investment for a company our size.

The additional point I would like to make, Senator, is that we wholly encourage an operation where we can have a renewal of our franchise based upon adequate performance during the period of the franchise. It is very, very difficult to make investments near the end of the franchise without an expectancy that those investments will be allowed to earn a fair return.

I know that issue has been addressed and I hope it will continue to be addressed as this bill receives its final markup.

Cox Cable on behalf of the entire cable television industry urges the committee to incorporate in the bill a provision which protects the legitimate renewal expectancy of incumbent cable television franchises.

The last comment I would like to make is that we believe it is very important that the legislation expressly limit the contractual ability of local authorities to require services at a rate regulation beyond that which is expressly permitted by the bill. This is especially important, Senator, in cases of franchise renewal where the individual company oftentimes is asked to do things on very short notice requiring it toss out substantial investment which has not been fully depreciated, and therefore places a tremendous economic burden on a company.

Thank you very much.

[The statement follows:]

STATEMENT OF ROBERT C. WRIGHT, PRESIDENT, COX CABLE COMMUNICATIONS, INC.

I am Robert C. Wright, president of Cox Cable Communications, Inc., a company which owns and operates 62 cable television franchises employing more than 4,000 people in 23 states.

Cox Cable is a communications company that provides an opportunity for home entertainment to more than 1.2 million households in areas of our country ranging from rural America to major population centers. We entered the cable television industry in 1962 and have the distinction of owning and operating the nation's largest cable television franchise in San Diego, and the oldest in Astoria, Oregon.

A consistent record of developing franchises within projected time schedules, and often exceeding franchise agreements, has earned Cox Cable a reputation among municipalities for honest, well-managed financially sound business practices. Programming is family-oriented and our pacesetting approach in the development and implementation of innovative and imaginative subscriber services has earned Cox Cable public esteem for unparalleled standards of excellence in the cable television industry.

By virtue of these facts and Cox's longstanding, ever-active involvement with local franchising authorities, I consider myself well qualified to testify on behalf of the entire cable television industry on those aspects of S. 2172 which relate to local franchising authorities and their cable franchises.

Let me first observe that S. 2172 represents a positive and long-overdue recognition of the need for legislation to clarify and delineate the division of regulatory authority over cable television. For well over two decades, the Federal Communications Commission and other agencies have attempted to regulate cable television. Results of these attempts have been neither successful nor beneficial to the consumer or the industry, as regulatory inaction followed by overregulation created substantial delays in implementation of cable television service throughout the country.

Enactment of S. 2172 would, however, offer the promise of regulatory certainty and a necessary degree of operational discretion to the cable television industry which would ultimately be of great benefit to consumers.

Some of the most significant provisions of the bill include those relating to local cable television franchising authorities and their relationships with the cable television franchises they regulate. These provisions would, if adopted, create a much-needed federal presence in the local franchising arena. And this cannot happen too soon.

After years of treating cable as something that is nice to have but also as something which can basically be left alone, cities, excited about CATV's well-documented (and well-publicized) potential, have decided that they must become intimately involved with the industry. This trend toward extensive municipal interference in CATV's operational environment, whether it be in the form of ownership or overregulation has the potential for stifling the full and free development of cable television which are optimally responsive to the needs of the public.

All too often the fragile nature of the cable television industry is not fully appreciated or understood. Revenues during 1981 were under $3.5 billion. The industry as a whole is smaller than the CBS television network. And cable television industry pay revenues collectively were less than the third-ranked NBC television network. AT&T, with $125 billion in assets, is 40 times greater than the entire cable television industry. Yet on the profit side we are often pictured as reaping huge profits. The fact is that most cable television companies have very little capital remaining after interest payments. I would estimate the "industry" will average less than 7 percent return on revenue, and less than 12 percent return on investments during 1982. Total net profits in 1981 probably did not exceed $250 million against $7 billion for AT&T.

Despite their size, cable television companies must make enormous capital investments in the communities they serve. In new, major markets, a cable operator must invest from $700 to $900 per subscriber to build a 54-plus channel system with two-way interactive capability. In order to earn a modest 15 percent return on that investment, a cable operator must generate $25–$30 per subscriber per month. He must do this while still competing with Subscription Television, Multipoint Distribution Service, Subscription Master Antenna Television, Direct Broadcast Satellite, Video Cassette Recorders, Free-TV, radio, movies and numerous other forms of home entertainment which are not subject to any local regulation, taxes, franchise fees, franchise renewals, etc. The cable television operator must pay municipalities approximately 5 percent of gross revenues in order to use power and phone company easements granted many years ago. Normally those companies are protected from paying the city any fees for the same rights.

Keeping these facts in mind, understand the precarious position cable television companies are in during initial franchising discussions, when cities do not hesitate to include one requirement after another in their Requests for Proposals ("RFP's"). Often, these laundry lists of requirements bear no relationship to the actual and immediate needs of individual communities. Occasionally, cities' exorbitant demands are simply too outrageous to warrant submission of bids by responsible major companies. There have been instances of this reported in the Washington newspapers.

To cite some examples, cities may demand authority over system programming, in some cases approaching censorship in contravention of First Amendment principles. Or they may require dedication of numerous access channels that are unnecessary for the community and cannot be economically provided by the cable television company. Rates in some cases have been regulated to such an extent and in such a way that cable television operator has no chance to earn a fair or even adequate return on what is a very significant capital investment.

Demands of this sort deter responsible bidders, and the ultimate victim is the public, which suffers delays in the institution of service, or worse, inadequate service by companies which find that they cannot implement a proposal they had to accept as a condition of the franchise.

A franchise provision that can deter potential bidders who otherwise would be interested and qualified involves a municipal buy-out at the end of the initial franchise term. A number of existing franchises contain provisions calling for buy-outs limited to book value, and many other cities which are in the process of awarding franchises frequently seek to include a book value buy-out provision in the franchises they award.

Such provisions, obviously, can complicate the process of obtaining financing. More significantly, they inhibit the operator's incentive, particularly in the latter years of a franchise, to create a system which is not just the sum of its component parts but which provides a real service to its community.

Section 605(c) of the bill would be effective in mitigating the problems associated with such provisions by at least requiring cities to buy out cable systems at their fair market value.

But buy-out provisions have another, far more significant defect which the bill should address: Such provisions totally fail to acknowledge an incumbent franchisee's legitimate renewal expectancy.

Investments in a cable televisions system represents an enormous capital commitment. In a Cox Cable franchise in New Orleans, the total capital commitment will be near $100 million, an extraordinary amount for a company of our size. But a system's commitment is more than just monetary: it is a commitment to a community and to the communications service. Companies who make that commitment and are conscientious and effective in fulfilling it should not be rewarded at the expiration of their franchises by a simple "good bye and now the system is ours" or "now let's hear from the next bidder." They have earned and deserve more. Specifically, they have earned the right to expect that their franchise will be renewed, and on reasonable terms.

I do not advocate such a provision in situations where the franchisee has ignored his obligations under the franchise or has rendered substandard service. In such cases, clearly, it may be appropriate to consider alternative ownership.

But when a franchisee has conscientiously and effectively fulfilled obligations under a franchise, and has not violated its terms and requirements, then it is completely inequitable to impose a penalty in the form of a requirement that the city be permitted to buy the system.

It is equally inequitable to require an incumbent to bid on the same basis as a new, untested applicant seeking to take over the franchise. It is very easy for an operator to come into a market which has been effectively serviced for a number of years by an existing franchisee and submit more paper promises than the incumbent. But such promises are just that-paper ones, which cannot fairly be compared with the actual performance of the present franchisee. Equity—and commonsense—demand that recognition be given to the past record of an incumbent and his right to expect a reasonable renewal.

This motion of a legitimate renewal expectancy is not a novel concept. The FCC has recognized that substantial equitable arguments favor a renewal expectancy for incumbent broadcast licensees. The Supreme Court, in its decision on broadcast-newspaper Cross-ownership, concurred in this recognition.

And this committee, too, has had occasion to consider the matter: Senator Goldwater last year introduced S. 601 which would have required renewal of television station licenses if the Commission found that the applicant was qualified and that during the previous license term its program service "substantially" met community problems and "the operation of the station has been free of any serious violation of this Act or the regulations promulgated thereunder."

An operator of a cable television system merits the same type of protection. If the franchise had been free of any serious violation of its terms, then the franchisee should be entitled to expect its renewal.

Therefore, Cox Cable, on behalf of the entire cable televisions industry, urges the committee to incorporate in the bill a provision which protects the legitimate renewal expectancy of incumbent CATV franchisees in franchise renewal proceedings, and which limits permissible city acquisition situations to instances involving default or willful and repeated serious franchise violations.

This brings me to the final topic I'd like to mention briefly: The question of the limits of permissible local regulation. The bill makes an admirable start of limiting the potential reach of local regulation, for example, in prohibiting rate regulation of other than so-called "basic services," and in preempting requirements calling for more than a certain number of access channels.

Yet the bill is still open-ended, and apparently would not preclude requests for proposals which circumvent its intent by asking for bids which exceed its limitations. But merely asking for a bid which, for example, includes several tiers of service in "basic service" or which contemplates provision of additional access channels, can be more effective than stating a specific requirement.

Cox Cable believes that it is important the legislation expressly limit local authorities' ability to require, directly or indirectly, provision of services or rate regulation beyond that which is expressly permitted by the bill.

This clarification may be arguably unimportant in an initial franchising situation, when interested bidders theoretically can walk away if local demands become too onerous. But in a franchise renewal situation, the incumbent is in many ways at the mercy of the franchising authority.

A fully operational cable television system represents a substantial capital investment. Faced with the Hobson's Choice of sacrificing that investment or accepting additional franchise requirements, because the city asks for them or because it is necessary to meet the paper proposals of a new entrant, an incumbent may have to make commitments that would otherwise make no practical or business sense. And that redounds to the ultimate detriment of the cable consumer.

In closing, I would again like to commend this forward thinking, much-needed CATV legislation. It represents a significant and necessary development in the history of cable television. Communications regulations, like S. 2172 deserve your favorable consideration.

Senator GOLDWATER. Thank you very much, Mr. Wright.

Our next witness will be Mr. David Stern, the executive vice president of the National Basketball Association.

Mr. STERN. Mr. Chairman and Senator Cannon, thank you for inviting us today to express our views on S. 2172.

Commissioner O'Brien is traveling during our playoffs, and I don't know if he was in Phoenix to see them cream Denver, but I am sure he will be at one of the LA games, and he is unable to be here this morning.

The NBA really, like other professional sports leagues, is in the entertainment business. We have an event that we try to sell either to fans who wish to attend in person or to viewers who can receive it over the air, on commercial television, by cablecast or by any of the other relatively new video delivery modes that the speakers today and yesterday have spoken to you about.

By way of example, we have recently concluded deals with two of the largest cable networks, the U.S.A. Network and the Entertainment on Sports Programming Network, to deliver over 80 regular season NBA games to probably over 20 million cable subscribers served by those two networks.

By deals, I mean something which is a time-honored tradition. We had a product to sell, they wished to buy the product and we struck a deal on price and terms.

Those same cable systems which get U.S.A. and ESPN and, as Mr. Myhren said earlier, perhaps the 10 Denver games that were cablecast in Denver under agreement with the club from which the club received revenue, under the 1976 Copyright Act those same cable systems are free to bring in unlimited numbers of NBA games by distant signal importation without our consent, over our objection, with virtually no compensation to us and irrespective of any damage that might be done to our other entrepreneural efforts.

Now the question that was being asked when the House of Representatives began studying this compulsory license was whether there was any policy justification for exempting the owners of cable systems, the Cox's, the Storer's, the Times, Inc., the Westinghouse's, the Warner Amex's, from having to acquire programing in a normal commercial environment.

Stated somewhat differently, we thought the question was, what policy considerations justified taking the programs of suppliers such as the NBA for the benefit of cable systems?

We very much appreciate the fact that section 616 of S. 2172 begins to address this question and recognizes that the unlimited compulsory license, were it ever justified, has long since become a burdensome and unfair appropriation of the property of program suppliers such as the NBA.

We thought that the House of Representatives agreed with this when they began their inquiry, but their route was a little bit unusual, to say the least. Their determination was that the best legislation was one that could be reached by a compromise of the parties involved and in this case, as Mr. Wasilewski told you, there was a very good compromise reached by the MPAA, by the NAB and by the NCTA. Unfortunately, it was reached at the expense of the only party that was not represented which was sports programing.

So that unlimited distant signal importation of sports programs would continue compulsory license fees would be kept low for that programing and, indeed, a variety of other things, all affecting sports in an unfavorable light, would occur.

We believe strongly that this subcommittee has begun approaching this subject correctly with section 616 and we look forward to working with it in terms of making some fair agreement amongst the parties. And in the absence of an agreement, we ask that the underlying policy considerations be addressed and that this committee look in terms of what is fair to the public, what is fair to the interested parties and not allow legislation to be written by some private agreement which excludes very specific interests that this committee now recognizes.

Thank you for inviting us.

[The statement follows:]

STATEMENT OF DAVID J. STERN, EXECUTIVE VICE PRESIDENT, NATIONAL BASKETBALL ASSOCIATION

Mr. Chairman, on behalf of the National Basketball Association and its member teams, I thank you for inviting us to present the views of the NBA with respect to S. 2172, the "Cable Telecommunications Act of 1982," which contains a provision that would prohibit the retransmission of games played by the teams in a professional sports league within 50 miles of the home stadium of any other member of that league, without the home team's consent.

The NBA believes that the fairest approach to resolving the distant signal importation issue would be to eliminate altogether the compulsory license, so that cable operators, like all other entrepreneurs, would be governed by the laws of free enterprise in the acquisition of product that they consider desirable. Nevertheless, the NBA endorses the sports provision of S. 2172, as a reasonable resolution of the conflicting private interests of professional sports and cable operators, while fairly taking into account the public interest of sports fans around the country.

The reasons for the NBA's opposition to continuing the compulsory license go well beyond the obvious interest of all program suppliers in the additional revenues that would likely become available from cable systems if those systems were required to bargain in the marketplace for the right to rebroadcast programs originated by distant television stations. The concern of the NBA derives instead from the very nature of its operation as a professional sports league, and the threat to such operation that is posed by the unauthorized and uncontrolled dissemination of its product.

Attendance—the lifeblood of all professional sports leagues—can be severely affected by the constant incursion into a team's local market of the telecasts of games involving other NBA teams. The damage to attendance can be particularly serious if the local team is not a playoff contender and the competing telecasts involve stronger, more attractive teams.

Another damaging aspect of distant signal importation is its effect upon teams whose local telecasts are producing only marginal income but are serving as important promotional devices for fan identification. If these telecasts must be shown against imported distant signals of more attractive games, their viewership will be threatened and their sponsorship decreased.

The third and perhaps gravest threat of distant signal importation, however, is in its impact on the NBA as a network television attraction. The NBA has repeatedly testified before Congressional Committees that the uncontrolled transmission of distant signals would jeopardize the League's network television revenues, which are vital to the financial viability of most NBA teams. With NBA games available on cable systems virtually every night of the week, a fan is far less likely to watch the NBA's Sunday network telecasts.

Unfortunately, these dire predictions have begun to come true. Although the NBA recently has entered into a new and lucrative contract with CBS Sports, that contract provides that, for the first time in almost 20 years, a national network will not have extensive coverage of NBA regular season games, but instead will concentrate on the playoff and championship series, where the League is able to grant greater exclusivity. The result is that NBA fans across the country, who have become accustomed to viewing a weekly NBA game during the regular season, now will have to pay cable subscription fees in order to get the same programming that they used to have on "free" television.

Virtually every objective analyst has recommended the elimination of the compulsory license, including the Register of Copyrights, the Chairman of the Federal Communications Commission, and the Director of the National Telecommunications and Information Administration of the Department of Commerce. Whatever reasons there may have been in the past for Congress to grant an extraordinary "compulsory license" to a fledgling cable industry no longer exist. That industry is now dominated by such corporate giants as Time, Inc., Warner Amex and Westinghouse, companies which are perfectly capable of bargaining for programming in the marketplace without the benefit of a compulsory license at the expense of sports and other program suppliers.

Although the NBA believes that the compulsory license properly should be abolished altogether, it is not opposed to a reasonable legislative resolution of the conflicting private interests of all program suppliers and cable operators, which fairly takes into account the interest of the public. S. 2172 still would not give the NBA the control over the sale of its product that other businesses have, but it at least would provide that type of control within 50 miles of NBA arenas, where it is most crucial to the operation and survival of the League and its teams.

The legislation being sponsored by Representative Kastenmeier in the House of Representatives, a so-called compromise among the National Cable Television Association, the Motion Picture Association of America and the National Association of Broadcasters, promotes the interests of those groups at the expense of professional sports. Inexplicably, Representative Kastenmeier has vehemently opposed all attemps to amend his legislation so as to permit professional sports to exercise the same rights as his legislation would grant to all other program suppliers. We appreciate this Committee's willingness to acknowledge the particular problems that distant signal importation is causing professional sports and strongly endorse the provision in S. 2172 that would add a new Section 616(a) of the Communications Act.

Thank you for permitting me the opportunity to provide the NBA's position.

Senator GOLDWATER. Thank you very much.

Our next witness will be Mr. William Bresnan, president of the Teleprompter Corp.

Mr. Bresnan.

Mr. BRESNAN. Mr. Chairman and Senator Cannon, I am Bill Bresnan, chief executive officer of Group W Cable, formerly Teleprompter Corp. I am also a member of the NCTA board of directors and executive committee.

I would like to commend this subcommittee, and particularly you, Mr. Chairman, for your effort to formulate a comprehensive cable policy. We believe that the general thrust of S. 2172 is very positive for cable and for the American public. And with the few exceptions which are being discussed by other cable witnesses, we support this legislation.

I have been asked to address the question of foreign ownership. And as one who has had personal experience with the cable ownership laws in Canada, I appreciate the opportunity to support section 605.

While the U.S. cable market has been wide open to growing competition in programs, services, and systems operations, a serious unfair condition concerning foreign ownership persists. While our market has experienced growing penetration from foreign-owned companies, particularly Canadian companies, the Canadian Government has insulated its domestic cable market from any foreign involvement.

In 1968 and 1969 the Canadian Government moved by law to compel foreign-owned companies to divest themselves of existing broadcast and cable systems. Through a series of directives the Canadian Government limited the permissible foreign ownership of broadcast stations and cable systems. It required all existing stations and system to conform to these new requirements.

This resulted in massive force divestiture of foreign ownership of broadcasting and cable interests across Canada. Fifty-six cable systems and 23 radio and television stations were affected. These exclusionary regulations remain in effect today in Canada. In short, the Canadian cable market which now has virtually all of its franchises awarded is closed to U.S. companies. Significantly this limitation applied not only to future stations or systems, but was made retroactive.

By contrast, present U.S. law does not restrict foreign ownership of U.S. cable systems. Free of any barriers from entering our market and promoted by the government aided dominance of our own mature market, Canadian cable operators have turned to the United States for new cable investments. Their penetration here is increasing at an alarming rate as they aggressively pursue new franchises.

Mr. Chairman, I would like to tell you of a personal experience that I had several years ago. We used to own and operate two systems in Canada, one in Sault Ste. Marie, Ontario, and one in Edmonston, New Brunswick. About 12 years ago I got a call from the president of a Canadian television company telling me that he would like to bid on one of our systems. I told him that the system was not for sale. At the time we were litigating the Canadian law.

He urged that this was in the best interests of our company and that I meet with him and I did. I remember we had lunch together and he made me a proposition. He offered to buy the system for a figure that amounted to about $75 a subscriber, around 10 cents on the dollar. I told him that we were not interested in selling at this time and if we were indeed ultimately forced to sell that we obviously would take bids and we would sell it to the highest bidder.

I will never forget this as long as I live. He leaned across the table, looked me squarely in the eyes and said, "Mr. Bresnan, you have no choice. I have been informed by the CRTC that I will be the licensee in that community and I will be the only bidder you will have to deal with." And he was right. About 2 years later after the litigation was over and the Americans lost, we were forced to sell and we had only one bidder and it was him and he paid us the price he wanted to pay us. We had no other bidders and we had no leverage whatsoever.

The Canadian operators made a windfall in that whole thing and, as I said, 56 cable systems and 23 radio and television stations went down the tubes as far as American investors were concerned at that time.

By the way, despite the concerns of an earlier witness from Portland, there was no disruption of service when our two systems were sold.

With that stark disparity of treatment as background, let me summarize why I believe the reciprocity provision of S. 2172 is so important.

First, the authority of the FCC to take account of these considerations is at best unclear. When the FCC considered this matter in 1979 they disclaimed any authority to enforce reciprocity concerns in the cable TV area. This legislation would clearly establish that authority.

Second, while foreign ownership of U.S. cable systems may have been de minimis in the past, today it constitutes a significant and rapidly growing trend.

Finally, I would emphasize that the purpose of S. 2172 is not to punish foreign nationals or to restrict commerce. Rather, it is designed to expand international commerce by inducing the elimination of barriers to it because no restrictions would apply here unless they apply there.

Canadian cable entrepreneurs active in our country may well argue that they cannot be held responsible for the action of the Canadian Government, but let them please direct us to just one expression of opposition to the protective and isolationist Canadian policy related to cable interests.

Mr. Chairman, I am tired of playing with a stacked deck supplied by our Canadian friends. This bill is a fair and moderate proposal. Canadian interests are accelerating their growth in our country and it is time for Congress to speak.

For these reasons, we urge this committee's prompt and favorable action on section 605 of this bill.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF GROUP W CABLE (TELEPROMPTER)

Teleprompter Corporation, currently in the process of changing its name to Group W Cable, Inc., a subsidiary of Westinghouse Broadcasting and Cable, Inc. ("Group W"), submits the following comments in support of the testimony given by its Chief Executive Officer, William J. Bresnan, at hearings held by this Subcommittee on April 28, 1982. These comments relate to Sections 605(b) and 606(a)(2) of S. 2172, the Cable Telecommunications Act proposed as Title VI to amend the Communications Act of 1934.

SECTION 606 (A)(2)

This section of S. 2172 relates to use of cable television by leased channel programmers on a nondiscriminatory, first-come, first-served basis. Group W submits that these provisions would create artificial barriers to our primary objective, to serve the public interest. It does so in response to an imagined need at a time when there is an unparalleled explosion of media outlets and while cable serves a relatively small portion of Americans.

Other participants in your consideration of S. 2172 will address the issue of channel capacity. Almost every such participant will tell you what you must require cable operators to carry or prohibit us from carrying on our channels. They will use ethereal rhetoric, painting our industry as George Owell's Big Brother dominating all cummunications media with monopolistic control over a communications bottleneck. Some will tell the Subcommittee that cable systems must carry broadcast stations; others will tell you we must provide significant public, educational and government channels, some would mandate institutional links for future business use, and the Subcommittee will surely hear an outcry for local production and programming for still more channels, all financed at the sole expense of the cable operator. Other parties will tell you what cable systems may not display on our channels, such as certain sports and syndicated program product as well as co-owned cable program services.

Absent in virtually all of these discussions will be any sincere consideration of the only interest that this Committee should address—the American public. Section 606(a)(2) does not address the important goal which we all support of public participation, diversity of voices and local community service. Inherent in the current franchising and refranchising process is the dedication of public, educational, governmental and local origination commitments, and the cable industry is meeting these important objectives.

In contrast to these objectives, a requirement to dedicate capacity to lease channel programmers has no support at all in legal, economic or social terms. Those who seek to lease channels for local service can gain access by creating a product the public wants to use. They have a free market incentive to test their ability to create advanced, competitive or appealing programming or services, rather than merely being "first-come." Further, the growth of new media outlets offers promise of greater diversity. Some proponents of mandatory channel leasing seek to serve the national, not local, marketplace, thereby negating any argument of cable system monopoly. Clearly there is no national dominance by any cable system operator since none controls even 10 percent of the cable market, and the entire cable industry now supplies only 25 percent of America's homes.

This is a national industry as healthy and competitive as any in our country with free and open participation by big and small, private and public, with the only barriers to entry being creativity and a willingness to take some risks. The explosion of new and highly diverse program services produced by a growing list of new entrants confirms this. To impose a requirement which could dramatically impact the current freedom and balance would be a serious mistake. There is no basis to the selfishness and paranoia of critics who unduly yell "monopoly".

The voice of our viewers is the voice that dictates the preservation of the current situation. To succeed in our business we must serve our customers. It has been proven over and over again that people will buy what they want and react adversely to vendors who ignore their needs. The Communications Act already requires that we serve the public interest, convenience and necessity. Group W's record in this area speaks for itself and we have learned that serving the public interest leads to business success.

It is time to stop preventing the cable business, with laws, rules and regulations, from giving the people what they want instead of what private interests would force us to deliver by expropriating or leasing our facilities. There simply is no problem in the area of capacity except one which artificial and unnecessary restraints would create. Cable operators are building systems which channel capacity in excess of available program services while old systems are being upgraded at an incredible rate to accommodate the many new services. Public demand is stimulating more and better service. No one is adding one or two channels to carry their own programming. Cable operators are adding 10 or 20 or 50 channels because people want news, weather, health information, sports, financial news, children's, senior citizens' and cultural programming, shopping services and numerous other services. To restrict the cable system operator's freedom to serve its public any more than now exists is a mistake. It is as big a mistake as the premise upon which any further restriction would be based; a misconception which assumes that a businessman can succeed by substituting an inferior, service for what the viewer wants most—quality service. The use of our cable channels today is market driven, serving the viewer's tastes, not those of a potential commercial lessee; and it should remain so. The current market place functions to permit the free exercise of viewer choice and the current ability of municipalities to deal with these considerations provides a proper balance of fair competition responsive to and serving the needs and interests of the public.

SECTION 605(B)

Group W—more particularly Teleprompter—welcomes this opportunity to comment in support of this section of S. 2172 which relates to fair competition by foreign owners of cable systems in the U.S. While the U.S. cable market has been wide open to growing competition in program services and system operations, a serious unfair condition concerning foreign ownership persists. While our market has experienced growing penetration from foreign owned companies—particularly Canadian companies—the Canadian Government has insulated its domestic cable market from any foreign involvement. As Senator Danforth and others have said, in order to sustain a healthy and expanding world economy, other nations must recognize that trade and mutual investment with the United States must be a "two-way street." Canada's own Secretary of State for External Affairs, The Honorable Mark MacGuigan agreed with this concept when, on January 29, 1982, he told the Los Angeles World Affairs Council that "it is trade liberalization, not protectionism, which has led to unprecedented prosperity". Secretary MacGuigan's quote was made just after referring to his country as the best friend and most important business partner the United States has.

These comments will attempt to summarize Canada's policy and practice regarding ownership of telecommunications facilities, to relate a brief history of our own company's experience in Canada and to convey our views on what this bill can do on this issue. By embracing the principle of reciprocity in the cable industry, this legislation would make clear to others that we prefer mutual openness, but that we will insist upon equity.

Canadian Policy.—The government of Canada has been embarked upon an effort to "Canadianize" its telecommunications industry since 1958.[1] The Canadian Broadcasting Act of that year limited, prospectively, the granting of broadcast licenses to Canadian citizens or to Canadian corporations that were at least 75 percent owned, directly or indirectly, by Canadian citizens. In 1964, this prospective "Canadian ownership" rule was extended to all aspects of Canadian broadcasting, including cable.

In 1968-69, the Canadian government moved to compel foreign-owned companies to divest themselves of existing broadcast stations and cable systems. The Broadcasting Act of 1968 declared, as Canadian national policy, that: The Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political and economic fabric of Canada."[2]

Through a series of directives over the next two years,[3] the Canadian Government reduced the permissible foreign ownership of ventures operating Canadian broadcast stations and cable systems to 20 percent of the voting shares and paid-up capital, and required all existing broadcast stations and cable television systems to conform to these new ownership requirements.

This series of Canadian actions resulted, between 1969 and 1972, in massive forced divestitute of foreign ownership of broadcasting stations and cable systems across Canada. This divestiture involved holdings in virtually every Canadian province, with an estimated total value of $150 million. Some 56 cable systems and 24 radio and television stations were affected.

Canada's further lack of interest in equitable first amendment and diversity of media goals is reflected in their laws prohibiting Canadians from deducting expenses for advertising placed with United States magazines and broadcast stations, laws by which Canadian cable systems avoid payments to U.S. copyright holders for material carried on cable, and laws restricting U.S. program suppliers from engaging in businesses in Canada.

Teleprompter's Experience.—Teleprompter had its origins in the very beginning of cable in the United States and Canada. Teleprompter's involvement in cable television in Canada resulted from the amalgamation or merger of the Teleprompter interests with those of a company called H & B Communications Corporation, a U.S. Corporation with Canadian cable interests. H & B was not only a pioneer in the growth and development of cable in the U.S. but, more than 20 years ago, had established or acquired cable systems at Edmunston, New Brunswick and Sault St. Marie, Ontario. At that point in time the relevant legislation concerned with the Administration of broadcasting in Canada was the Broadcasting Act passed in 1958. That Act was concerned with the licensing of broadcasting stations, i.e. radio and television, not cable. While S. 14 of that 1958 Act limited foreign ownership to 25 percent, it did not require stations having more than 25 percent non-Canadian ownership to reduce such ownership to 25 percent. In other words the limitation on foreign ownership was not made retroactive so as to require divestiture by those stations having foreign ownership of more than 25 percent.

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[1] The information in this section, unless otherwise indicated, is drawn from Canadian Ownership in Broadcasting: A Report on the Foreign Divestiture Process, Canadian Radio-Television Commission (1974).

[2] Broadcasting Act of 1968, R.S.C.-1970, c.B-11, s.3(b).

[3] These actions were embodied in a series of directives to the Canadian Radio-Television Commission, in particular: P.C. 1968-1969 (Sept. 20, 1968); P.C. 1969-630 (Mar. 27, 1969); P.C. 1969-2229 (Nov. 24, 1969); P.C. 1971-37 (Jan. 12, 1971). See also 1971-72 Annual Report, Canadian Radio-Television Commission, at 5 et seq.

But the laws passed in 1968 and 1969 which are described above forced companies like Teleprompter to sell out. This procedure has been variously described as expropriation or confiscation; but whatever the description, it resulted in a reluctant vendor being forced to sell within a prescribed time to a limited market at prices which reflected the distress sale imposed.

With minor changes, these exclusionary regulations remain in effect today in Canada. Current Canadian law provides that licenses will not be issued or renewed to persons who are not Canadian citizens or to corporations with less than 80 percent of their voting stock held by Canadians. In short, the Canadian cable market, which now has virtually all of its franchises awarded, effectively was and continues to be closed to U.S. companies. Significantly, the limitation on non-Canadian ownership applied not only to future stations or systems but was made retroactive.

U.S. Policy.—By contrast, present U.S. law does not restrict foreign ownership of U.S. cable systems.

Section 301(b) of the Communications Act effectively limits alien ownership of U.S. broadcast licensees to 20 percent (up to 25 percent under certain circumstances).[4]

Until 1974, Section 310's alien ownership rules also applied to cable system operators who sought to transmit their signals over the microwave radio frequencies dedicated to cable transmission by the FCC. However, in 1974, Congress dropped the alien ownership restrictions from these microwave services.[5] Thus today, while there remains strict limits on alien ownership of U.S. broadcasting licensees, there are no federal restrictions on alien ownership of cable systems.

Free of any barriers from entering the U.S. market, and prompted by the restrictive regulatory environment and slowed growth potential in their own market, Canadian cable operators increasingly have turned to the U.S. for new cable investments. Their penetration of the U.S. market is increasing at an alarming rate. In 1976, Canadian-controlled companies served some 100,000 U.S. homes, less than 1 percent of all U.S. cable subscribers at that time.[6] Today, that number has jumped by over 600 percent. Conservatively estimated, Canadian-controlled companies today reach into more than 675,000 U.S. homes, and the Canadian share of the total market of U.S. cable subscribers has risen to over 3 percent.[7] In December 1980, *Barrons'* estimated that Canadian companies would be serving up to 7 percent of U.S. cable viewers by the late 1980's, a projection they might revise upwards today in view of the intense franchising activity now being pursued by Canadian companies in the United States.

One of the true ironies of the current state of affairs is the initial stimulus for the success of cable television in Canada. Canada's cable industry began to grow based largely on imported signals of U.S. border television stations. Hence, a foreign industry which grew by freely distributing the programming of U.S. broadcasters, now uses their earnings to compete in our country while we are unable to provide service in Canada.

Attached is an appendix which compiles a list of the major Canadian companies which own U.S. cable systems, the cities of operation and the number of subscribers.

Reasons for S. 2172.—With that stark disparity of treatment as background, it becomes apparent why enactment of the reciprocity provisions of S. 2172 is so important.

First, the authority of the FCC to take account of considerations of market equity under current law is, at best, unclear. Restrictions on foreign ownership of cable television systems were proposed to the Commission in 1979, but ultimately were rejected.[8] In so doing, the Commission disclaimed any authority to enforce reciprocity concerns in the cable television area, stating that: "We do not believe a desire for reciprocity in international investment policies by itself provides an adequate basis for action on our part.[9]"

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[4] 47 U.S.C. Section 301(b) (1976).

[5] *See* Act of Nov. 30, 1974, Public Law No. 93-505, 88 Stat. 1576.

[6] *See* Television Factbook, 1981-82 Services Volume, at 83-a.

[7] *See* Appendix A. These figures include systems owned or controlled by Canadian multiple system operators. They do not include U.S. systems owned by other Canadian individuals or entities.

This legislation would clearly establish that authority.

Indeed, we would urge strengthening of the legislation not only to authorize, but to require that the FCC adopt rules and regulations implementing the reciprocity principle embodied in Section 605(b). Given the FCC's past reluctance to enter this area and its present resource restraints, we believe the purposes of this legislation would more certainly be effectuated with a directive from the Commission to implement Congressional policy.

Second, while foreign ownership of U.S. cable systems may have been de minimus in the past, today it constitutes a significant—and rapidly growing—trend. As stated in the Senate Commerce Committee Report on S. 898, quoting the Assistant Secretary of Commerce for Communications and Information: "the United States is vulnerable to a steady erosion of its position in the international marketplace unless we respond by focusing our attention on (the telecommunications) sector. We should not wait until the effects of foreign actions have so impacted our industries that they cannot recover."[10]

Finally, we emphasize that the purpose of S. 2172 is not to punish foreign nationals or to restrict commerce; rather it is designed to expand international commerce by inducing the elimination of barriers to it. The growth and development of our country has been founded on a belief in open and unfettered competition. It is Group W's belief that such a system leads to the maximization of benefits to the consumer, the economy, the innovator and the investor or risk taker.

Canadian cable entrepeneurs active in our country may well argue that they cannot be held responsible for the action of the Canadian government. We would be pleased to be directed to just one expression of opposition of the protective and isolationist Canadian policy related to cable or broadcasting interests.

The U.S. cable industry is tired of playing with a stacked deck. We are prepared to compete with foreign owned companies if the rules of the game are fair. A policy that affords the same opportunities abroad as we afford others at home is fair competition. An international regime that leaves our markets wide open to foreign companies while their home markets are closed to ours is not fair. This legislation would promote equality abroad and it is time for Congress to speak. Section 605(b) is a fair and moderate proposal. If they will not open their borders, then Group W urges you to recommend the adoption of this bill in a way that makes it apply not simply to intended cable investment, but to existing investment. Canadian interests are accelerating their growth in our country in anticipation that some fair legislation like that proposed here will freeze their investments. We cannot permit them to profit from this opportunistic and selfish ploy.

CONCLUSION

For the foregoing reasons, Group W opposes the adoption of section 606(a)(2) mendating channels dedicated to commercial leases and urges this Committee's prompt and favorable action on Section 605(b) of this bill. We also urge you to slightly modify Section 605 to require the FCC's adoption of the reciprocity principles and to require the same divestiture of unfairly competing foreigners that was imposed on our company. Group W thanks you for this opportunity.

APPENDIX

Cable Ownership in United States by Canadian Multiple System Operators

	Subscribers
Selkirk Communications Ltd. Fort Lauderdale, Hallandale FL	22,078
Cable America (80 percent owned by Cablecasting Ltd.) Atlanta, DeKalb, Sandy Springs GA	22,339
McLean Hunter Cable TV Ltd.	
Suburban Cablevision	103,000

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[8] Foreign Ownership of CATV Systems, 77 F.C.C. 2d 73 (1980). The Commission previously had declined to adopt foreign ownership restrictions in 1975. *See* Report and order in Docket No. 20621, 59 F.C.C. 2d 723 (1976).

[9] *Id.* at 79.

[10] S. Rep. No. 97-170, 97th Cong., 1st Sess., at 53-54.

	Subscribers
East Detroit MI	5,150
Rogers Cablesystems, Inc.	
Eden Prairie NM;[1] Syracuse NY;[1]	
Huntington Beach CA[1]	50,000
UA-Columbia (51 percent owned by Rogers)[2]	468,000
Gerald Kazma Maryville IL; Plymouth Twp. PA	13,800
Total	684,367

[1] Subscriber figures from 1982 National Cable Television Ass'n Advertising Directory; Television Factbook, 1981–82 Services Volume.

[2] Systems: Yuma, Ariz; Fort Smith, Greenwood & Jonesboro, Ark.; El Centro, Cal.; Aspen, Basalt & Rifle, Colo.; Fort Pierce & Vero Beach, Fla.; Marysville & Pittsburg, Kan.; Beatrice, Neb.; Wayne, N.J.; Alamogordo, N.M.; New Rochelle & Patchogue, N.Y.; McAlester, Okla.; Hermiston, Pendleton & Pilot Rock, Ore.; Fayetteville, Lawrenceburg & Pulaski, Tenn.; Gainesville, Laredo, Mount Pleasant, San Angelo, San Antonio & Winters, Tex.; Kennewick, Wash. Also franchises in: Manila and Osceola, Ark.; N. Attlegoro, Mass.; Paterson, N.J.; Mamaroneck, N.Y.; Randolph AFB, Tex.

Note: 3.3 percent of 21,000,000 subscribers.

Senator GOLDWATER. Thank you very much, Mr. Bresnan.

Our next witness will be Mr. Robert Rosencrans, president and chief executive officer, Rogers UA Cablesystems, Inc.

Mr. ROSENCRANS. Thank you, sir.

My name is Robert Rosencrans. I am president and chief executive officer of Rogers UA Cablesystems, Inc.

Our company is owned by two shareholders: Rogers Cablesystems, Inc., a Canadian concern which holds 51 percent, and UA Communications, an American concern, which holds 49 percent.

In 1962, along with a group of associates, I entered the cable television industry and over the past 20 years we have successfully developed a cable company serving approximately 500,000 subscribers. In 1981 we sold our concern to the two owners referred to above, namely, Rogers Cablesystems and UA Communications.

During our history we were at the leading edge of the cable industry, both from an engineering and programing standpoint. Our credits include the industry's first installation of an Earth station in 1975, which so altered the nature of our business. In 1977 we founded the U.S.A. Network, the first basic cable satellite network using original programing, a forerunner to Cable News Network, ESPN, CBS Cable, and others.

We are also particularly proud of our role in helping to initiate C-Span which distributes by satellite the House of Representatives proceedings and other governmental activities to cable subscribers internationally. I had the privilege of being C-Span's first chairman and today serve on its executive committee.

I am very pleased to see C-Span's cameras here covering these proceedings and then passing them out to so many subscribers who will be well informed, those that are interested, well informed on these proceedings.

I would like to congratulate you, Mr. Chairman, and the members of this committee on your efforts to develop a national policy for cable. S. 2172 is an ambitious piece of legislation with two commendable goals.

First, as I understand it, the bill seeks to clarify the lines of authority separating local, State, and Federal regulation of cable.

Second, it does this in order to foster the kind of competitive environment which will insure that cable realizes its full promise.

In spite of the generally procompetitive thrust of S. 2172, there is however at least one provision which emerges as something of an anomaly. I am referring to section 605(b), which effectively requires the FCC to restrict foreign-owned cable companies from competing in the U.S. market.

Unlike most of the other ownership policies established in the bill, section 605(b) would reduce the total number of participants in the cable industry and diminish the overall level of competition. The provision then would conflict with the larger goals of the legislation.

More important, the measure is without precedent in at least one respect. As members of this committee may know, all of the so-called foreign cable companies operating in the United States are Canadian. Moreover, the Canadian Government has for some years prohibited foreign-owned cable companies from operating in its own markets.

Thus, to propose foreign ownership restrictions based on the principle of reciprocity, as this does, is to propose Canadian ownership restrictions. No other foreign Government or foreign-owned companies would be affected.

Canada is one of our country's oldest and staunchest allies. Although our Government has on occasion adopted policies which restrict trade even with our closest allies, it has never, to the best of my knowledge, forced one of our allies' citizens to divest their U.S. investments. And yet, that is precisely what S. 2172 may accomplish.

I would like to emphasize this point. We should not confuse the issue raised here with those of foreign trade and the problems our country has encountered with the Japanese. The bill would limit investment by Canadians in U.S. businesses. Given the very substantial amount of U.S. investment in Canada, I am not sure we want to fire this shot, especially when we have so little to gain. In any event, one would hope that before this committee takes such a radical and unprecedented step, it would have extraordinary compelling reasons for doing so.

The foreign ownership restrictions in the bill would harm not only Canadian business persons but U.S. investors as well. For example, I am responsible to the Canadian investors in my firm. However, I am also responsible to a group of U.S. stockholders who have made a substantial investment in that same firm. The foreign ownership provisions of S. 2172 threaten the investments of both groups.

Nor is my company unique. U.S. investors in Portland, Atlanta, Syracuse, Los Angeles, suburban Chicago and in communities throughout New Jersey would be similarly affected. And to what purpose?

In theory, at least the proposed foreign ownership restrictions are to be used as a tool for opening the Canadian market to U.S. companies. But with 70 percent of its homes already passed by cable systems, Canada has a comparatively cable market. Moreover, it is a heavily regulated market in which operators are subject to Federal rate regulation, community programing requirements and other measures which U.S. operators would find onerous.

As drafted, the foreign ownership restrictions of S. 2172 represent a form of sector specific reciprocity, a policy which the Reagan administration has consistently opposed, regardless of whether the particular section in question is cable television, copper, automobiles, or wheat. As I alluded to earlier, experts in trade policy argue that sector specific reciprocity is usually an ineffective tool which can ultimately harm U.S. interests at home and abroad.

On its face, though, the reciprocity principle appears to be eminently fair. But is it, especially in this case? A report commissioned by the Canadian Minister of Communications shows that shortly before Canada adopted its present ownership restrictions, foreign companies controlled 9 of the 10 largest cable systems in Canada, while U.S. companies alone served fully 77 percent of all Canadian subscribers.

Moreover, much of the programing seen on Canadian systems was purchased in the U.S. Consequently, a Canadian cable subscriber was likely to watch U.S. programing on a U.S. owned system.

I can fully understand why members of this committee would not support the Canadian Government's ownership policies. I also cannot or would not support Canada's position. Further, I am sympathetic with the position of many of my colleagues who have been treated unfairly. That does not justify our responding in kind, however.

Obviously, the situation in the United States today is not comparable. The Federal Communications Commission has twice rejected requests to ban the Canadian companies, noting that their share of the U.S. cable market was miniscule. While that share may have grown in the last few years, it is still very, very small.

For all these reasons then, I would urge this committee to heed the advice of the administration, the Community Antenna Television Association and the National League of Cities: delete section 605(b). Remember, it is a truly unprecedented measure. To the best of my knowledge, if implemented as currently written, it would represent the first time the U.S. Government has ever demanded that our allies divest their holdings here.

In this regard I would urge the committee to take note of the policy of the National League of Cities which would require the Federal Government to withhold action until it had demonstrated that Canadian companies were in danger of dominating the U.S. market.

Remember, the question of foreign ownership has arisen repeatedly in local franchising situations. Many municipalities have rejected bids from Canadian companies. Until those companies threaten to dominate our industry, let the cities retain their authority.

This committee has the power to bar many Canadian investors. But in doing so, it will also strike out at thousands of U.S. citizens who have invested in Canadian companies or rely on them for superior cable service. I would urge you to bear those U.S. citizens in mind and to act in their interests.

Thank you very much.

[The appendix follows:]

APPENDIX

FACTS ABOUT CANADIAN CABLE OWNERSHIP IN THE UNITED STATES

During the last five years, the U.S. cable television industry has waged a vigorous campaign to keep so-called "foreign owned" cable companies from competing in a rapidly expanding U.S. market. The fact is, however, that the term "foreign ownership" is somewhat misleading. As even the National Cable Television Association (NCTA) has acknowledged, Canadian firms are the only foreign-owned cable companies operating in the U.S. Moreover, their share of the market is small. As a result, the Federal Communications Commission (FCC) has twice rejected industry requests to ban the Canadian firms. Congress, too, has refused to act.

The U.S. cable industry has cited a variety of reasons to justify its demands, arguing, for example, that Canadian cable systems threaten national security and are insensitive to U.S. viewers' needs for local programming. Most recently, the industry has invoked the principle of reciprocity, urging the U.S. to ban Canadian firms here until Canada opens its market to U.S. cable companies.

On its face, the reciprocity principle appears to be only fair. But is it, at least when applied to Canadian cable companies? As Tables 1 and 2 show, Canadian cable companies today serve less than four percent of all U.S. cable subscribers. By contrast, U.S. companies served 77 percent of Canadian cable subscribers in 1969, when the Canadian government imposed its ownership restrictions. In fact, nine of the top 10 Canadian cable systems were then foreign-owned, while U.S. programming accounted for almost 35 percent of all Canadian cable viewing hours.

Given the Canadian's small share of the U.S. market, why, then, have U.S. firms been so persistent in their efforts to oust the Canadian competitors?

In the first place, the Canadians are tough competitors. They offer the high quality local programming and the technological innovations that are so important to U.S. city officials awarding cable franchises. To compete effectively in the fierce franchise battles now underway in America's major cities, U.S. companies are forced to promise and deliver comparable high quality service. To ban Canadian competitors would be to reduce the level of franchise competition, as the FCC noted in 1980, when it rejected just such a measure:

"At this time it is difficult for us to perceive how the television viewing public would benefit in any way from the regulation requested. Rather . . . such a restriction would merely promote the self interests of the domestic cable television industry at the expense of additional competitive alternatives for the public in the franchising process."

Second, proponents of reciprocity argue that it is a tool to enhance U.S. business opportunities abroad. But with 70 percent of its homes already passed by systems, the Canadian cable market is comparatively small. Moreover, it is tightly regulated, with cable companies in Canada subject to federal rate regulation, mandatory local programming requirements and other federal measures which might discourage their comparatively unregulated U.S. counterparts. Until recently, the Canadian government also prohibited "pay cable"—one of the most popular and profitable programming services in the United States.

Perhaps because of these market constraints, the U.S. cable industry has never asked the Canadian government to lift its ban on foreign-owned firms, according to the Canadian Embassy here.

Several parties oppose Canadian ownership restrictions. The National League of Cities (NLC), for example, has adopted a resolution urging the federal government not to impose a ban on foreign-owned cable companies unless it could be shown that they were threatening to dominate the U.S. market.

The Reagan Administration also has rejected a proposed ban on Canadian cable systems as a form of sector-specific reciprocity, while the FCC argues that such a prohibition should be handled as part of a comprehensive trade policy developed by the Office of the Special Trade Representative, State Department and Commerce Department. The Community Antenna Television Association notes that the proposed ban would stifle the overall level of industry competition. In short, reciprocity is supported by only some elements of the U.S. cable industry.

TABLE I

	Homes		Subscribers
	Franchised area	Passed	
Rogers [1]	1,700,000	1,118,108	589,385
Maclean Hunter	429,000	372,152	144,954
Cable America	477,000	189,500	48,900
Cablenet	175,000	35,000	14,000
Selkirk	120,000	100,000	37,203
Total	2,901,000	1,814,760	834,442

[1] Includes service provided by U.S. Cablesystems Inc., the U.S. subsidiary of Rogers Cablesystems Inc., and Rogers-UA Communications.

Table 2

Canadian cable companies now serve:	*Percent*
U.S. TV homes [1]	1.0
U.S. cable subscribers [2]	3.5
U.S. homes passed by cablesystems [3]	4.1

[1] U.S. subscribers to partially or wholly owned Canadian cable systems	834,400
U.S. TV homes	81,500,000
[2] U.S. subscribers to partially or wholly owned Canadian cable systems	834,400
U.S. cable subscribers	23,700,000
[3] U.S. homes passed by partially or wholly owned Canadian cable systems	1,814,760
U.S. homes passed by cable systems	43,900,000

NOTE.—Data on the total number of U.S. TV homes, cable subscribers and homes passed by cable systems were obtained by NCTA from A.C. Neilsen, March 1982.

RECIPROCITY: A LEGISLATIVE AND REGULATORY CHRONOLOGY

The current attempt to ban Canadian cable companies from U.S. markets has its roots in two laws: the Broadcasting Act of 1968, an attempt by the Canadian government to reform its own communications policies; and a 1974 amendment to the Communications Act of 1934, an effort by the U.S. government to eliminate "a costly and unnecessary device" for granting select radio licenses to foreign-owned companies.

THE CANADIAN SITUATION

The 1968 Broadcasting Act was a broad piece of legislation, designed to achieve four goals: (1) Increased service to remote and urban areas; (2) increased service to both French and English speaking Canadians: (3) a balance of entertainment and information programming; and (4) the development of original Canadian programming.

To reach these ends, the statute created the Canadian Radio-Television and Telecommunications Commission (CRTC), a semi-autonomous agency charged with developing and enforcing a series of new broadcast and cable regulations. The new law also incorporated some earlier statutes which had banned foreign ownership of broadcast stations—statutes which had been on the books but never enforced by the Canadian government. In 1969, a cabinet-level directive extended those restrictions to foreign-owned cable systems in Canada.

In many respects, the policy shift—indeed, the 1968 Broadcasting Act itself—was a belated response to well-developed industry trends. American cable companies were dominating the Canadian market.

As early as 1956, for example, 17 percent of Canadian TV stations already were foreign-owned. By 1967, two years before the Canadian government imposed its ban, CBS had a substantial interest in the largest single cable system in Canada—serving more than 200,000 subscribers. Foreign owners controlled half of the top 50 and nine of the top 10 Canadian cable systems, while U.S. owned or controlled companies alone served 77 percent of all Canadian cable subscribers.

Moreover, there was an indirect link between foreign ownership and programming. In 1968, programming from nearby U.S. broadcast stations accounted for almost 35 percent of all Canadian cable viewing hours. As a result, Canadian audiences were likely to watch U.S. programming on U.S.-owned cable systems.

The Canadian government had almost no choice but revive its long dormant policies on foreign ownership if it was ever to achieve the goals of the 1968 Broadcasting Act. In order to preserve service to the public and to minimize financial loss to owners, the government allowed companies to maintain operations until they could locate a buyer willing to pay a fair market price. Consequently, foreign-owned broadcast stations still were operating in Canada through the mid-1970s.

American firms remain an important force in Canadian cable programming today. That market could grow when pay cable—which may use much more U.S. programming—comes to Canada in the next few years.

U.S. LEGISLATIVE HISTORY

Despite the fact that Canada did not impose foreign ownership restrictions until the late 1960s, the United States had developed and enforced similar policies since the early 1900's as a means of protecting national security. In 1974, Congress concluded that some of these restrictions were unnecessary. Reasoning that "the need for a radio license should not depend upon the size or form of an organization," it eliminated the subsidiary requirement for foreign-owned companies holding licenses for safety, special and experimental radio services.

Cable television operators were among those licensees affected by the change. Cable systems in the United States have never been licensed like broadcasters. However, cable operators often use microwave radio to relay broadcast signals from a TV station to a cable system. Prior to passage of the 1974 amendment, a foreign-owned cable system would have been required to establish a subsidiary to obtain a radio license for its Cable Television Relay Services (CARS). It was precisely this type of arrangement which the Congress found to be "a costly and unnecessary device" that could be removed without posing any threat to national security.

THE FCC CONSIDERS FOREIGN OWNERSHIP

One year later, the U.S. cable industry asked the FCC to adopt a rule prohibiting aliens, foreign government, or foreign corporations from owning or operating cable systems in the United States.

Although not subject to licensing requirements, cable systems were then obliged to obtain a Certificate of Compliance, showing their conformity for FCC franchising standards. The petitioners requested the FCC to adopt the statutory limitations on foreign ownership as an FCC rule that would prohibit the Commission from granting a Certificate of Compliance to Canadian cable companies.

Supporters of the restriction challenged the ability of so-called "alien owners" to meet the programming needs of unfamiliar communities and cited the need to protect national security.

Opponents of the restrictions tried to refute these arguments. NCTA, for instance, claimed that cable systems, whether owned by Canadian or United States companies, were not broadcast stations and should not be regulated as such. The opponents also argued that Canadian cable companies heightened industry competition—competition which ultimately worked to the advantage of cable subscribers.

The FCC rejected the cable industry's call for Canadian ownership restrictions. The Commission reminded the industry that cable operators ultimately were responsible to local communities. "It's these local jurisdictions that are in the best position to determine whether or not an individual operators' nationality will prevent him from satisfying his pubic interest obligations." Ultimately, the Commission concluded: "in the absence of demonstrable harm and where benefits may result, the Commission is inclined to allow free market forces to determine the direction of capital flow within the industry."

By 1979, the FCC had dropped most of its franchising requirements, including the mandatory Certificate of Compliance. However, Midwest Cable, Inc. (Midwest), a system owner and operator in Mt. Carmel, Illinois, asked the Commission to prohibit foreign-owned or controlled cable systems from carrying the signals of any U.S. broadcast stations. Since the FCC required cable systems to carry local broadcast signals, Midwest was asking the Commission to adopt one rule which would make it impossible for Canadian-owned systems to comply with another. Also, an important new issue surfaced for the first time—the principle of reciprocity.

With the emergence of this new issue, NCTA reversed its earlier position. By 1980, the trade association became an articulate and outspoken champion of reciprocity, urging the FCC to ban Canadian cable companies from operating here until Canada lifted its prohibition on U.S. firms.

To date, the U.S. cable industry has been a major proponent of what is known as sector-specific reciprocity. In 1979 and 1980, for example, the industry succeeded in persuading Senator Barry Goldwater to include a foreign-ownership ban in a draft revision of legislation he had authored. Ultimately, the Senator dropped the measure in June 1980.

The issue of Canadian ownership was raised in the House a few months later when Commerce Committee Chairman Harley Staggers introduced H.R. 8206, a bill that also used the reciprocity principle to ban Canadian firms. Introduced just days before the House recessed for the 1980 election, H.R. 8206 was never brought to a vote. As a result, the 96th Congress never formally considered foreign ownership legislation.

Recently, the debate over Canadian ownership has been rekindled in Congress. On July 21, 1981, Representative Doug Walgren introduced H.R. 4225, which prohibits foreign ownership of cable systems. Walgren's bill would exempt a foreign-owned or controlled cable system from such prohibition only to the extent that the foreign cable system's country allows the United States or a U.S. citizen to operate cable systems in the foreign country.

On March 4, 1982, Senator Goldwater, Chairman of the Senate Communications Subcommittee, introduced the Cable Telecommunications Act of 1982 (S. 2172), a bill which would create a separate title in the Communications Act to deal with cable television. Section 605(b) gives the FCC auhtority to establish rules requiring reciprocity for countries that restrict U.S. entities.

In hearings on the Senate legislation, Sec. 605(b) was opposed by the National Telecommunications and Information Administration, the Federal Communications Commission, the National League of Cities, the Community Antenna Television Association, the City of Portland, and a number of U.S. cable operators whose companies are partially owned by Canadian firms.

Senator GOLDWATER. Thank you very much, Mr. Rosencrans.

Howard, do you have questions?

Senator CANNON. Let me ask Mr. Kuhn, you and Mr. Stern have both testified that unless the provision of a sports blackout is included in any cable legislation that professional sports will face grave economic harm.

Why have you had no success in solving this problem by reaching an agreement on broadcasting the number of games or redistributing the revenues from broadcasting?

Mr. KUHN. In basketball actually, Senator, there has been a limit placed on the number of games that can be carried.

It is possibly something that professional baseball could be driven toward. I will tell you the problem I have with that. If you start putting limits on the number of games that can be telecast, I think you have to ask a very serious question. Are you serving the public interest?

The average major league baseball team telecasts 62 games in the course of a year. That means that something in the neighborhood of 1,600 total telecasts are authorized by major league baseball teams in the course of a season. That is a tremendous service to the public. It may be one of the great sports attractions that exists. If you start limiting that, are you serving the public interest and are you serving the interests of professional baseball?

I have some question about it, Senator, and I am not certain that we should be driven in that direction—though I will freely admit that if worse comes to worse and we can't get any help, we may be driven in that kind of direction.

As far as revenue sharing, which I think you were touching on in the second part of your question, revenue sharing is all right up to a certain point in the football league where you are only selling eight home games a year, there, revenue sharing makes sense.

In baseball we are selling 81 home games. That means you have got to have a lot of local initiative and incentive. If you begin to impair that too much with revenue sharing, you are going to have a very serious effect on the operation of baseball teams. We are moving more toward it, but I think in baseball there is a limit on how far you can go.

Senator CANNON. Mr. Stern, do you wish to comment?

Mr. STERN. Senator, we have begun to limit the number of games. Actually the distant signal importation problem could be completely eliminated if all of our teams were precluded from televising games over the air in their home markets, but that is not a route that we want to take.

I am not here talking about danger to the league, although there is that element. What I really stressed in my remarks was the fact why are cable systems given in effect free access to our product when there is a marketplace out there. We effectively deal in the marketplace and I don't see why there should be a more favored position for them than there is with respect to over-the-air stations or any other program acquirers.

Senator CANNON. Mr. Bresnan, bids for franchises to provide cable service have almost come to defy anyone's imagination. Not only are systems being promised to over 100 channels, but also included are grants to communities, training programs and other facilities to the franchising municipality. And all this is offered for a very small initial cost to the consumer.

How can these promises be kept without a renegotiation of the cable contract after only a few years of service?

Mr. BRESNAN. I must say, Senator Cannon, that some of the bids are indeed unrealistic in our view and in fact we have ourselves withdrawn from certain markets where we feel that the bidding has gotten out of hand. So I can't speak for those companies. I would suspect that your fears are valid in some cases.

In our own case, we have never submitted a bid that we don't believe that we can live with and have done all of our bidding in good faith and we have no plans to renegotiate.

Senator CANNON. Can the franchising process be altered so that the promises made when the initial bids are asked could be maintained throughout the franchising period?

Mr. BRESNAN. Yes; I think that there could be certain Federal preemption and guidelines that could be helpful in the franchise bidding process. I think in the areas particularly of franchise fees, for example, and other in-like products and services that in effect amount to franchise fees is a good area that Federal guidelines would be helpful in.

Senator CANNON. Mr. Rosencrans, let me ask you this question. Under the reciprocity provision what would preclude someone in Saudi Arabia from offering reciprocity to our country over here and then being permitted to come in under the reciprocity provision and get in business here in this country?

Mr. ROSENCRANS. I suppose an applicant from Saudi Arabia applying for a francise somewhere in this country might have a very difficult assignment. I don't think that they would be well received by the local authority where really these decisions I believe belong.

The Canadian applicants are very knowledgeable about our country. They spend a great deal of time in this country and they have built operations comparable to what we have been building in the past. So I think it is up to them and they have done a successful job in some communities selling their corporation and their people and their ideas and in others they have been unsuccessful.

So I think it gets down to that local franchising authorities. I believe that someone from an area that is truly alien from this country would not be successful in that process.

Senator CANNON. Thank you, Mr. Chairman.

Senator GOLDWATER. Mr. Kuhn and Mr. Stern both, I understand that you are making studies to let the committee know the economic impact of our bill upon your industry; is that correct?

Mr. KUHN. We would be very happy to make such a study.

Senator GOLDWATER. I wish you would because, while it won't have a great bearing, we would like to know what this bill's application would be compared to what you have today in the way of the economics of running your systems. Could you do that for us?

Mr. KUHN. I would be happy to do so.

Senator GOLDWATER. Thank you.

Now, Mr. Kuhn, you have indicated the sports provision of this bill is necessary to protect the weaker teams in baseball. What efforts do the members of the league take today to assist each other, recognizing that you do have very weak members of both leagues and you have very strong members?

Mr. KUHN. Senator, we have fairly uniformly taken the position that the sports paragraph, section 616, is really necessary for the benefit of all because things go up and down in sports. They are obviously particularly concerned about, say, a Cleveland Indians franchise that has been struggling in recent years. They have lost a great deal of money on their operation.

I have here in front of me an advertisement run just a couple of days ago on April 21 by Viacom Cable Television in Cleveland for their Channel 12. It advertises 120 Atlanta Braves games to be carried in Cleveland by Viacom. That is the superstation of course.

This kind of thing is of very serious concern to us. These examples plainly can be multiplied. For example, the new cable franchisee in Boston has said he will carry 600 baseball games in Boston each season once he gets hooked up.

We have obviously tried to do things in baseball to support the weaker teams. For example we have the free agent draft which is designed to give everybody an equal crack at talent and not let the stronger teams get the best of it. We share gate revenues in baseball. All national broadcast revenue is shared essentially equally in baseball, and we are looking at some other revenues for sharing.

But as I said a moment ago to Senator Cannon, there is a limit on how far you can go in baseball as opposed to, say, football where you can have nearly equal sharing, lest you destroy the local incentive of a club to do well with the 81 games it has got to work with. If you share everything you are going to lose a lot of incentive and it is going to have a very deleterious effect on the willingness of a club to do its very best if everything it does, no matter how good it is, is just simply shared and pooled with everybody else.

Mr. BRESNAN. Mr. Chairman, could I comment on that, please?

Senator GOLDWATER. Yes. By the way, if any of you want to comment on answers to questions, go ahead.

Mr. BRESNAN. Thank you. Notwithstanding the rhetoric from my colleagues on this panel this morning, the fact remains, Mr. Chairman, that major league or professional sports is a business, and that is fine, but they are not an eleemosynary association as they might have us believe.

The fact is, to the best of my knowledge, they have never even attempted to show that cable has injured professional sports. They certainly have never documented that. What they are asking for now is a protection that they have never proved is necessary in order to insulate their pocketbooks at the expense of the American public.

Mr. STERN. I would like to respond to that, Senator. I think it is somewhat backwards. We are an eleemosynary institution. As I said, we are in business and we sell an event. We are not asking for the protection. We are asking for a protection that had been mandated in 1976 that gave cable systems preferred access to our product because it was perceived as an industry in crisis at the time which has undergone a significant evolution in the intervening 6 years.

What we are saying is that we sell our events and we would like to make some money off of those and we are not ashamed of that fact. But right now cable operators say, well, they position it in such a way that the NBA, baseball and others are now seeking some protection. Mr. Turner will tell you that we are trying to seek a monopoly. Exactly the opposite is true. We are trying to get the same control over our products that any other entrepreneur in this country enjoys.

Mr. BRESNAN. May I respond to that, sir?

Senator GOLDWATER. Yes.

Mr. BRESNAN. They indeed are selling their services to the broadcasters and the cable systems are in turn picking up those broadcasts. The rates that the broadcasters are paying for those games reflects the fact that cable is carrying it.

In fact, my colleagues at Group W Television tell me that the new contracts that they are signing are for two and three times the amount of the previous contracts. So instead of being hurt, they are actually being helped.

Mr. KUHN. That simply is not so, I say with all respect to Mr. Bresnan. That characterization of our situation is simply nonsensical. The hurt is very clear. The fact that we cannot yet produce a corpse, Mr. Chairman, to prove that we are being hurt is beside the point. Is that what they really want us to do? Do they want an autopsy and a few bankrupt clubs in basketball, hockey, baseball and soccer to demonstrate that we are not being hurt. We are in fact being greviously hurt?

There is not a person in professional sports or an expert who analyzes this dispassionately, and many of those experts have been cited in our papers, who doesn't agree that professional sports is being hurt by this and should be entitled to a free market.

The paradox, as Mr. Stern points out, is that our friends in cable argue vigorously for deregulation and a free market for all aspects of their business save one, when they take from us. Then they want a compulsory license and then they want a fixed market, and that is nonsense.

Senator GOLDWATER. Thank you, gentlemen, for those comments.

Mr. Rosencrans, section 605, gives the FCC authority to prohibit the foreign ownership of cable if no reciprocal rights are granted to U.S. companies. I will add that this does not mean that it would be retroactive. Those serving now would not be bothered. But why can't you tell the Canadian Government to let the U.S. companies operate cable systems in their country?

I think with the great relationship we have had with Canada all of these years where Canadian money invests in our country, and I think Canadians are the biggest investors in Arizona land, for example, and U.S. money goes to Canada. One of the beauties of our relationship has been this freedom going back and forth. But I don't think it is fair that the Canadian cable companies can come to the United States and we can't go to Canada.

Now it is a simple thing I think to tell the government to just change their ways or otherwise I think this part of the bill is going to pass.

Mr. Rosencrans. Well, to be responsive to that, I think we should talk to the Canadian Government, but I think the Canadian Government has personified overregulation far more than even the overregulation we have been sensitive to in this country, and I think they have a certain sensitivity. The dominance from this country in terms of investment and in terms of programing, the Canadian cable industry really got going much ahead of this industry in this country because of the desire to pick up American signals. So their whole cultural scene is affected by it and this has all inspired some of their feeling.

I think it is wrong and I think the Canadian operators and the American associates of those Canadian operators should urge the Canadian Government to change their ways. I don't think it will happen quickly, but I think it is incumbent upon us to do what you suggest. When someone else is doing the wrong thing, I am not sure it is wise for us to do the wrong thing in return.

Senator Goldwater. Well, I am inclined to agree with you, but we do that for so long and we are in trouble. We are watching our automobile industry go down the tube, not altogether the fault of foreign competition but some fault of their own. We have the Japanese now wanting to buy into the cable industry of the United States. So foreign ownership is no longer something that is "maybe" in our country.

If you think it would be of any value, I would be very glad to contact the government of Canada. I don't know how far I would get. They may tell me to go to Hell, but I can tell them the same thing.

Mr. Rosencrans. You might be more effective than those that have already tried. I am sure of that.

Senator Goldwater. Would you please give it a try. I don't like this kind of legislation. I don't like to protect American industry unless we have to protect it.

Mr. Rosencrans. I think it should also be added, and it may have been mentioned earlier, that Canadian ownership is still miniscule. It still represents I think under 4 percent of all the subscribers in this country and it is not likely to get bigger. It is likely to get smaller.

The growth of the cable industry is clearly going to be an American owned institution. It will not go the way of the automobile industry or others. Of course, if that danger were to become more apparent, and it is very easily followed by statistics, then I would perhaps urge that reciprocity be enforced at a point where it is a dominance of danger, but it is not even close at this point.

Senator GOLDWATER. Well, I will do my best. I will relate one little thing to you to show how strong that small segment of our total cable business is politically.

It was 2 or 3 years ago that I had an amendment on some bill to give a tax break to the country of Mexico because we had written legislation that practically prohibited Americans or U.S. citizens from going to Mexico and making any deductions for conventions. It was through the intervention of the Canadian people through a former U.S. Senator that my amendment got shot down. I am not holding that against Canada. I would like to know how the hell they did it.

But I just mention that. You are not a weak little segment of the American cable system.

Gentlemen, I want to thank all of you for being here and please keep us informed. As I have said before, we are not experts in this and we have to depend on you.

The next panel will be Mr. Tom Staubitz, president of the New Mexico Cable Television Association; Mr. R. E. Turner, chairman of the board of the Turner Broadcasting System of Atlanta; Mr. Robert Johnson, president of Black Entertainment Network; Mr. Robert Bilodeau, executive vice president of Suburban Cablevision; and Mr. Wiles Hallock, chairman of the NCAA Football Television Committee.

Will the meeting come to order, please.

I have a statement I want to read before we proceed with this panel. Before I call on the next panel of witnesses, I would like to make something clear for the record.

I appear on a regular basis on the Cable News Network which is owned by Mr. Ted Turner who is testifying before us today. I want to assure everyone that this in no way influenced the drafting of my bill or any of its provisions. In fact, as you will hear from Mr. Turner, he is somewhat dissatisfied with this sports blackout provision in the bill. And with that we will get on with Panel No. 3.

Because some of our members have to leave, I would like to rearrange the schedule just a bit and ask Mr. Turner to lead off.

Did you have a statement?

Senator SCHMITT. Yes, Mr. Chairman. I thought Cable News was treating you very kindly and I am surprised you drafted the bill this way.

Senator GOLDWATER. Well, I can change my mind.

Mr. Turner.

STATEMENTS OF TOM STAUBITZ, PRESIDENT, NEW MEXICO CABLE TELEVISION ASSOCIATION, HOBBS CABLEVISION; R. E. TURNER, CHAIRMAN OF THE BOARD, TURNER BROADCASTING SYSTEM, INC.; ROBERT L. JOHNSON, PRESIDENT, BLACK ENTERTAINMENT TELEVISION NETWORK; ROBERT D. BILODEAU, EXECUTIVE VICE PRESIDENT, SUBURBAN CABLEVISION; AND WILES HALLOCK, CHAIRMAN, THE NCAA FOOTBALL TELEVISION COMMITTEE

Mr. TURNER. Yes, sir.

Mr. Chairman and members of the subcomittee, my name is Ted Turner. I am president and chairman of the board of Turner Broadcasting System. Turner Broadcasting is privileged to be a part of the fast growing cable industry that your bill, S. 2172, addresses.

Our particular business involves the provision of sports entertainment and news programing to the public over cable. Twenty-one million cable homes now receive movies and the games of the Atlanta Braves and Atlanta Hawks over WTBS, the superstation. Over 12 million cable homes now receive Cable News Network providing 24 hours in-depth news coverage, feature programs and commentary. CNN II reaches another 1 million homes with a news headline service.

Because these networks are new and extremely expensive undertakings, Mr. Chairman, we are concerned that Government regulation not inadvertently destroy them. For this reason we are concerned about one section of S. 2172, section 616, that would appear inconsistent with your overall procompetition objectives.

That section would prohibit the retransmission of a television broadcast of any professional sports game over any cable system located within 50 miles of any team in that same league absent the consent of that team. In effect, it grants a legislative monopoly to each team in a professional sports league over the television exhibition of all similar professional sporting events in its geographic market.

This provision would have a devastating impact on the superstation and the public. Hundreds of cable systems would be required to delete the Atlanta Hawks and the Atlanta Braves games carried on WTBS. The resulting loss of audience and advertising revenues derived therefrom could destory the superstation and the dependent cable news networks. More importantly, 21 million homes, and it is actually closer to 60 million people, would be denied the program and sports diversity the superstation and other televisions now provide them.

There is no need for this protectionistic restriction. The prices paid for sports franchises, even for poor teams has increased dramatically in recent years, as noted in my more lengthy prepared remarks.

Similarly, team revenues derived from home gate receipts and from the sale of television and radio exhibition rights have also continued to dramatically increase.

Moreover, as an owner of two professional sports teams, I know from firsthand experience that home games attendance is dependent on a number of variables. These include market demographics, ticket prices, weather, stadium location and condition, population density and distribution, performance of the team on the field and competence of management.

Neither cable carriage of sports nor any other single factor can be blamed for inferior economic performance. This was fully documented by exhaustive blackout studies the FCC did for Congress between 1976 and 1978. Indeed, there is substantial evidence that television, including cable, stimulates public interest in sporting events and increases the gate attendance.

Finally, there are several obvious fallacies to league arguments that this restriction is necessary to protect the weak teams in the league. First, the restriction on cable carriage is not limited to cities with weak teams. It applies nationwide and protects some of the wealthiest individuals and corporations in America who currently own these franchises. Their teams already receive Government support through depreciation and income sheltering tax loopholes and from municipal subsidization of most of the stadiums in which they play.

Professional sports needs a Government mandated monopoly like the Arabs need more oil. The average baseball salary is now over $240,000 a year, 4 times that of a Senator and 10 times that of a high school principal.

Second, most teams are now creating regional pay TV sports networks. They have asked for this legislative monopoly, not to protect the weak teams, but to protect these pay networks from any competition whatsoever with nonpay cable sports services like WTBS.

Third, the restriction subverts the public interest to serve the private interests of some of the wealthiest people in America who own these franchises. All you have to do is take a look at the ownership. Chicago Tribune of the Chicago Cubs, Doubleday Printing owning the New York Mets and so forth. Taft Broadcasting just bought the Phillies for $30 million. It would destroy competition and the enjoyment of millions of fans nationwide.

Fourth, Government should be a means of last resort to failing companies. And only then where the affected parties have exhausted all private solutions. That is certainly not the case here. No effort has been made by the successful franchises in baseball or basketball, for example, to assist the financially weaker teams, which the Braves and the Hawks certainly are.

Unlike the National Football League which shares television revenues and gate receipts among teams on an equitable basis, in professional baseball and basketball, hockey and soccer, it is every franchise for itself.

Mr. Chairman, there is no need for a legislative restriction on the cable television exhibition of sports games. This is not a communications issue, nor is it a copyright issue. It is a monopoly issue, and no public interest will be advanced in granting such a monopoly to the few multimillionaires who own sports teams at the expense of millions of ordinary hard-working Americans who are the paying sports fans.

Mr. Chairman, thank you for the opportunity to testify today, and I will be pleased to answer any questions.

[The statement follows:]

STATEMENT OF R. E. TURNER III, CHAIRMAN OF THE BOARD AND PRESIDENT, TURNER BROADCASTING SYSTEM, INC.

Mr. Chairman, members of the subcommittee, my name is Ted Turner. I am president and chairman of the board of Turner Broadcasting System.

I appreciate this opportunity to testify on S. 2172, the Cable Telecommunications Act. Cable television, as you know, is one of the fastest growing and most dynamic of all the communications technologies. Turner Broadcasting is privileged to be a key part of this industry.

Our particular segment of the cable business involves the provision of sports, entertainment and news programming to the public. Over 21 million cable homes in all 50 states (90 percent of all homes enjoying cable service) now receive the signal of WTBS Atlanta—the Superstation. The primary, basic entertainment service offered by cable, WTBS broadcasts diversified family information and entertaining programming including movies and the baseball and basketball home games of the Atlanta Braves and Atlanta Hawks. For millions of Americans it represents the primary alternative to the humdrum, look alike programming of the three commercial television networks.

Within the last two years, we have initiated two, all new, cable television networks: CNN I and CNN II. Now available nationwide to over 12 million cable homes, CNN I provides 24 hour, in depth news coverage, feature programs and commentary on the issues and events shaping our world. CNN II, inaugurated just last January, already reaches 1 million homes across the nation with a quick response, news headline service.

With their worldwide newsgathering sources and satellite technology, the Cable News Networks can go anywhere, instantly, to get any story. With a 24 hour broadcast format, they not only can stay with a story to its conclusion, they provide a level of analysis and access to divergent viewpoints and ideas not otherwise available. Together, they provide an information alternative to the cable subscriber far superior to conventional news media.

Because these networks are fledgling and extremely expensive undertakings, Mr. Chairman, we are very concerned that government not adopt any unnecessary regulation that would restrict or undermine the delivery of cable services to the public. We are gratified, accordingly, by the dregulatory approach your subcommittee and the Senate have adopted in recent years. We enthusiastically support the revitalization of competition in this country that has been the purpose of much of your recent legislation.

For this reason, we are concerned about one section of S. 2172, Section 616, that would appear inconsistent with your pro-competition objectives. That section would prohibit the retransmission of a television broadcast of any professional sports game over any cable system located within 50 miles of the stadium of any team in the same league, absent the consent of that team. In other words, this section would grant a legislative monopoly to each team in a professional sports league over the television exhibition of all similar professional sports in its geographic market.

Under this section, for example, the cablecast of an Atlanta Braves or Atlanta Hawks game within 50 miles of the stadium of another professional team, say the New York Yankees, would be prohibited. The hundreds of cable systems that now carry WTBS' broadcast of these games would be required to delete that programming.

The loss of audience, and the advertising revenues derived therefrom, produced by this restriction would destroy the Superstation and the dependent Cable News Networks. More importantly, the 21 million people who receive the Superstation, and who recently watched the Atlanta Braves set a new, opening season, record of 13 consecutive wins, would be denied the program and sports diversity the Superstation now provides. The national impact would be even more severe.

As an inveterate sports fan and as an owner, I know of no fact or reason justifying such government intervention in the sports market. By all available and relevant measures of business performance, there is no demonstrable need for a federal policy to restrict competition in the television exhibition of professional sports. Neither the leagues nor their members are in such desperate financial straits to warrant federal intervention. To the contrary, professional sports continue to be an exceptionally viable and profitable activity.

This is demonstrated, for one example, by the continuing increase in the value of sports franchises in recent years despite the growth of cable and the presence of sports exhibition alternatives like the Superstation. For example, the New York Yankees and San Diego Padres sold for $12 million each in 1973. In 1981, the Chicago White Sox and Cubs sold for $20 and $20.5 million, respectively, while the Philadelphia Phillies sold for $30.2 million. This growth in franchise value reflects the continuing vitality in the revenue generating capability of professional sports.

The two principle sources of team revenues are, of course, derived from home gate receipts and from the sale of television and radio exhibition rights. With respect to home game attendance, there is no evidence that cable's exhibition of sports games has significantly or adversely affected gate receipts. Between 1975 and 1980, for example, while the number of cable households increased from 9.8 to 15.5 million, an increase of 57 percent, home attendance at professional baseball games increased by 44 percent from 29.8 to 42.9 million.

Nor has this phenomena been limited to the major leagues. In the same period, home attendance for the Richmond Braves, one of the farm teams for the Atlanta Braves, increased by 174 percent from 68,348 to 187,462 despite the fact that the Richmond market is also served by a modern, 36 channel, cable system that imports several broadcast signals carrying major league baseball games.

Sales of television exhibition rights, the other major sports revenue source, is proving a bonanza. Television has created a gold mine for profits right on the playing field! Consider, for example, the recent contract between the broadcast networks and the NFL. For exclusive exhibition rights to three different packages of NFL games, the three networks agreed to pay $1.9 billion over 5 years. An increase of 197 percent over the $640 million they paid for a similar 4 year package that ended this year, average TV revenues per team will increase from the $5.6 million earned last year to $12 million this year and an average of $14.2 million per year over the life of the contract. This average television revenue figure of $14.2 million per year exceeds the total gross revenues earned by the Washington Redskins in 1981 ($13.5 million), and is 70 percent of the 1980 sales price ($20 million) of the Denver Bronco franchise.

The numbers in baseball, while not quite so dramatic, paint a picture almost as rosy. Network payments for nationally televised games in 1982 will total $53.4 million, up 20 percent over 1981. In addition, however, sale of exhibition rights by individual teams to local radio and television affiliates increased by 34 percent in 1982 over the prior year, from $48.4 million to $64.95 million. In addition, the sports interests receive copyright royalty fees under the compulsory license system established under the Copyright Act for cable's retransmission of broadcast games.

Most important, however, absolutely no connection has been established between cable's carriage of sports and the economic performance of the teams. The FCC, which looked at this issue several years ago, rejected the proposition as without foundation. It's conclusion was supported by the blackout studies the FCC did for the Congress between 1976 and 1978 which showed that weather and team performance effected attendance, but that television had no appreciable impact. This Subcommittee, itself, rejected an approach, called retransmission consent, that was similar to this one 3 years ago in considering S. 611 and S. 622.

As an owner, I know from first hand experience that home game attendance and overall economic performance of a franchise are dependant on a number of complex and interrelated variables. These include market demographics, ticket prices, the weather, stadium location and condition, population density and distribution, the performance of the team on the field, and the competence of management. Neither cable carriage of sports nor any other single factor can be blamed for inferior economic performance. Indeed, there is substantial anecdotal evidence that television, including cable, stimulates public interest in sporting events and increases live gate attendance.

It is important to remember also that sports franchises in general are owned by the wealthiest individuals and corporations in America: Doubleday owns the Mets, the Chicago Tribune owns the Cubs, Taft Broadcasting the Phillies, Ray Krock, who invented MacDonald's, owns the Padres, to name a few. The list is endless. While they have invested millions, they make millions. In a time of shrinking budgets, these men need no government handout.

Moreover, the government and the taxpayer already underwrite the sports business by providing tax loopholes that give the owners favorable depreciation benefits, and that permits them to shelter income from their other businesses. In addition, many of the stadiums in which these teams play are municipally owned and subsidized.

That this group needs a government mandated monopoly is like saying the Arabs need more oil. The average baseball salary is now about $240,000 a year; four times that of a Senator and 10 times that of a school principal. For the government to further support this industry at the expense of the average fan, by denying the public the availability of cable retransmissions of broadcast games, would be perversion of the public interest.

The leagues argue, however, that not all teams are economically sound and that the restriction is necessary to protect the weak teams. There are several obvious fallacies with this reasoning. First, the restriction on cable carriage is not limited to the cities with weak teams: it applies nationwide and protects the wealthy as well.

Second, the cost/benefit priorities of the provision are out of kilter: to serve the private interest of a few weak teams in a few areas, the provision would destroy competition and the enjoyment of millions of fans nationwide.

Third, government support should be a means of last resort to failing companies and only then where (a) there is a demonstrable public interest served thereby, (b) the affected parties have exhausted all private solutions. That is certainly not the case here. There has been no effort in baseball, for example, for the successful franchises to assist the financially weaker teams. Unlike the NFL, which shares television revenues and gate receipts among teams on an equitable basis, it is every franchise for itself in baseball.

In conclusion, Mr. Chairman, there is no public need for this restrictive legislation. Professional sports are thriving. More important, professional sports, including baseball, have chosen to live by the market. They should be permitted to thrive or not in that market. However, if government finds it necessary to underwrite particular baseball companies, it should do so directly, perhaps on the same basis it bailed out Chrysler. It should not look for some false panacea, like retransmission consent, that won't necessarily aid the weak teams, but that clearly will destroy competition and program diversity for the public.

Senator GOLDWATER. Thank you very much, Mr. Turner.

Our next witness will be Mr. Tom Staubitz, president of the New Mexico Cable Television Association.

Mr. Staubitz.

Mr. STAUBITZ. Thank you very much, Mr. Chairman.

I would like to borrow just a second here of the time. I brought along a baseball shirt of the softball team that I sponsor in Hobbs, N. Mex. This is our true colors. We are a very winning team in Hobbs. And I would like to present this to Mr. Ted Turner which happens to be No. 13 which his team set a major league record last week by winning the first 13 games of the season.

Mr. Chairman and members of the subcommittee, my name is Tom Staubitz and I operate a cable television system in Hobbs, N. Mex., as well as serving as president of the New Mexico Cable Television Association.

On behalf of the New Mexico cable operators, I would like to thank you for inviting me to testify here today.

In addition, I would like you to know, Senator Goldwater, how much we appreciated having the opportunity to appear before Senator Schmitt when he held a field hearing of this committee with your approval in Albuquerque on February 16.

Appearing as I do on the final day of the hearings on S. 2172, I have had a chance to read through some of the statements made earlier by other witnesses. I believe that my colleagues from the cable industry have made a very strong case for the Federal preemption of excessive local regulation of cable.

By preemption I do not mean merely moving the level of regulation from the local to the Federal level, but rather the prohibition of a great deal of the regulation of cable TV.

With your permission I will not talk about cable's problems with the cities this morning. I am very fortunate to have an extremely good relationship with the city government of Hobbs. As a matter of fact, Senator, just the other day I had a chat with the city manager and we were discussing rate regulation. He responded, "Tom, there is absolutely no reason why I should be regulating your rates of the cable system here in Hobbs with the good service you provide."

I would, however, like to talk about other problem areas of the cable operators in New Mexico that they are having right now, and that involves pole attachments. When the League of Cities talks about cable they always use the word "monopoly."

While I think we have shown that cable is not a monopoly, there are indeed very real monopolies involved in cable television and those are the telephone and electric utilities whose poles and conduits cable operators must use in order to provide the service. Since no government I know of wants to allow a duplicate set of poles in their rights-of-way, cable has no choice but to attach its wire to the existing utility poles.

In 1978 Congress had the good sense to enact the pole attachment law which was intended to guard against monopoly pricing of pole attachments by these utilities. The Federal Government did not set rates but rather established the mechanism where a cable operator could appeal to the FCC if he felt the utility was not quoting him a fair and reasonable rate. That is a process which relies on good faith negotiations between the utility and the cable operator and only involved the FCC as a last resort.

However, there are three problems involving the pole law which NCTA and our State association in New Mexico hope that you will address in S. 2172.

First, the present pole law is scheduled to expire in February 1983. We urge that you extend the law past this date. Nothing has happened since enactment of the law which makes it any less necessary than it was in 1978. If anything, the need is even greater.

Second, the pole law needs to be strengthened so utilities cannot end-run its intent. Let me give you an example of the abuses that have developed. One of New Mexico's largest electric utilities, Southwestern Public Service, recently demanded of one of our members an attachment charge of $5 per pole per year.

Now the FCC has determined that a reasonable attachment rate for Southwest Public Power's poles would be in the range of $1.10 per pole. Now how did Southwest arrive at the $5 rate? They rounded a $1.10 off to an even $2 and then added a mandatory $3 per pole service charge. For the additional $3 the cable company might be informed of any instance were the cable has been broken or otherwise damaged, if the utility happened to notice the damage. The notification would not have been given in a timely manner and in no event did the $3 fee include any repair whatsoever.

As noted, this service fee was not optional and the utility claimed that it did not technically violate the pole attachment law because it was not an attachment per se. On top of this, Southwestern Public Service demanded that the cable operator sign a statement that it would not challenge this $5 total charge in the courts or before the Federal Communications Commission.

In short, Southwest Public Service managed to exceed the maximum pole attachment allowable under the FCC guidelines by 78 percent.

Third, the pole law must be amended to include publicly and cooperatively owned utilities. The ability of a utility to extract monopoly for prices for pole attachments is completely unrelated to the form of ownership. Moreover, the potential for abuse is even greater for the following reasons:

Because rural co-ops are not prohibited by Federal law from owning cable systems in low density areas, they have the incentive to drive out the potential private operators by quoting excessively high pole attachment rates, so high that it is not feasible for the private company to construst the system, thereby leaving the franchise area to the co-op to develop. Cable operators have no recourse whatsoever in these situations.

A second situation is rural co-ops have an unfair advantage when competing for a cable franchise against a private sector. While a private company has to borrow money at going interest rates, rural co-ops can turn to the REA for a highly subsidized loan.

Now, it may be justified to make below-market loans for basic essential services such as electric and telephone, but I do not in no way believe the Federal Government has the luxury with an estimated deficit of over $100 billion next year of underwriting low-interest loans for nonessential services such as cable television.

I am not talking about potential problems we have with rural co-ops, but real ones. Just the other day one of our systems called me to tell me that an REA co-op in New Mexico in his area was raising the pole attachment fee from $5 to $14. The reason given by the co-op was that it needed to buy several new bucket trucks to service telephone lines and didn't want to pay for these trucks themselves.

I am told that when this committee held a field hearing in Seattle in January that my counterpart from Washington State Cable TV Association told about similar examples where the privately owned utilities were charging between $3 and $4 per pole while the publicly owned utilities were going anywhere between $10 and $12 per pole.

I don't need to remind anyone that a utility pole is a utility pole and there is no justification for that sort of rate differential.

Mr. Chairman, in New Mexico our biggest single problem is with pole attachments. We do not want anything free or at subsidized rates. But the utilities who own these poles are regulated public utilities because they provide a service which is essential without any substitutes. They are using that monopoly power in a way which will keep many rural Americans from receiving cable television by making it economically impossible to provide it to them.

I don't think that is what you want and it is certainly not what the New Mexico cable operators want.

Thank you very much, and I will be happy to answer any questions.

[The statement follows:]

STATEMENT OF THOMAS STAUBITZ, PRESIDENT, NEW MEXICO CABLE TELEVISION ASSOCIATION

Mr. Chairman, Members of the Subcommittee: My name is Tom Staubitz and I operate a cable television system in Hobbs, New Mexico as well as serving as the President of the New Mexico Cable Television Association. On behalf of the New Mexico cable operators, I would like to thank you for inviting me to testify here today. In addition, I would like you to know, Senator Goldwater, how much we appreciated having the opportunity to appear before Senator Schmitt when he held a field hearing of this Committee, with your approval, in Albuquerque on February 16.

Appearing as I do on the final day of the hearings on S. 2172, I have had a chance to read through some of the statements made by earlier witnesses. I believe that my colleagues from the cable industry have made a very strong case for the federal preemption, of excessive local regulation of cable. By preemption, I do not mean merely moving the level of regulation from the local to the federal level, but rather the prohibition of a great deal of the regulation cable television—but none of our competitors—is now subjected to by some overzealous city governments.

With your permission, I will not talk about cable's problems with the cities this morning. I am fortunate to have extremely good relations with the government of Hobbs; as a matter of fact, the city manager told me just the other day that he saw no need to regulate cable television any more than any other private business ought to be regulated by a city government. So even if I tried, I couldn't give you a first hand account of bad experiences I have had with city regulation because I am not regulated in the first place.

I would, however, like to talk about another problem many of the cable operators in New Mexico are having, and that involves pole attachments. When the League of Cities talks about cable, they always use the word "monopoly." While I think we have shown that cable is not a monopoly, there are indeed very real monopolies involved in cable television, and those are the telephone and electric utilities whose poles and conduits cable operators must use in order to provide their service. Since no government I know of wants to allow a duplicate set of poles in their rights of way, cable has no choice but to attach its wire to the existing utility poles. Without these pole attachments there can be no cable television, period.

In 1978, Congress had the good sense to enact the pole attachment law which was intended to guard against monopoly pricing of pole attachments by these utilities. The federal government did not set rates, but rather established a mechanism where a cable operator could appeal to the FCC if he felt the utility was not quoting him a fair and reasonable rate. It is a process which relies on good faith negotiations between the utility and the cable operator and only involved the FCC as a last resort. However, there are three problems involving the Pole Law which NCTA and the New Mexico cable operators hope you will address in S. 2172.

First, the present pole law is scheduled to expire in February 1983. We urge that you extend the law past this date. Nothing has happened since enactment of the law which makes it any less necessary than it was in 1978. If anything, the need is even greater.

Second, the pole law needs to be strengthened so utilities cannot end-run its intent. Let me give you an example of the abuses that have developed. One of New Mexico's largest electric utilities, Southwest Public Service, recently demanded of one of our members an attachment charge of $5.00 per pole per year. Now the FCC has determined that a reasonable pole attachment rate for Southwest Public Power's poles would be in the range of $1.10 per pole per year. How did Southwest arrive at their $5.00 rate? They rounded $1.10 off to an even $2.00 per pole, then added a mandatory $3.00 per pole "service charge." For the additional $3.00, the cable company might be informed of any instance where the cable had been broken, or otherwise damaged, if the utility happened to notice the damage. The notification would not have to be given in a timely manner and in no event did the $3.00 fee include any repair whatsoever.

As noted, this service fee was not optional, and the utility claimed that it did not technically violate the pole attachment law because it was not an attachment fee per se. On top of this, Southwest Public Power has demanded that the cable operator sign a statement that it would not challenge this $5.00 total charge in the courts or before the FCC. In short, Southwest Public Power managed to exceed the maximum pole attachment rate allowable under the FCC guidelines by 78 percent.

Thirdly, the Pole Law must be amended to include publicly and cooperatively owned utilities. The ability of a utility to extract monopoly prices for pole attachments is completely unrelated to the form of ownership. Moreover, the potential for abuse is even greater for the following reasons:

Because rural cooperatives are not prohibited by federal law from owning cable systems in low density areas, they have the incentive to drive out potential private operators by quoting excessively high pole attachment rates—so high that it is not feasible for the private company to construct the system, thereby leaving the franchise area to the co-op to develop. Cable operators have no recourse whatsoever in these situations. While private telephone companies may try to get as high a fee as possible, at least they have no incentive to price an attachment so high as to drive the cable company out of business since the private utility would not have the option of then offering the service itself.

Second, rural cooperatives have an unfair advantage when competing for a cable franchise against a private operator. While a private company has to borrow money at going interest rates, rural co-op's can turn to the Rural Electrification Administration for a highly subsidized loan. Now it may be justified to make below-private market interest loans for basic, essential services such as electric and telephone, but I do not believe the federal government has the luxury—what with an estimated deficit next year of over $100 billion—of underwriting low interest loans for nonessential services such as cable television.

I am not talking about potential problems we have with rural co-ops, but real ones. Just the other day, one of our member systems called me to say the REA cooperative in his area was raising the pole attachment fee from $5.00 to $14.00. The reason given by the co-op was that it needed to buy several new bucket trucks to service its telephone lines, and didn't want to pay for these trucks themselves. I am told that when this Committee held a field hearing in Seattle in January, my counterpart from the Washington State Cable Television Association told about similar examples where the privately owned utilities were charging between $3 and $4 a pole, while the publicly owned utilities were charging between $10 and $12. I don't need to remind anyone that a utility pole is a utility pole, and that there is no justification for that sort of rate differential.

Mr. Chairman, in New Mexico our biggest single problem is with pole attachments. We do not want anything free or at a subsidized rate; but the utilities who own these poles are regulated public utilities because they provide a service which is essential and without any substitutes; they are using that monopoly power in a way which will keep many rural Americans from receiving cable television by making it economically impossible to provide it to them. I don't think that is what you want, and it certainly is not what the New Mexico cable operators want.

Thank you for inviting me to be here today, and I will be happy to answer any questions you may have.

Senator GOLDWATER. Thank you, Mr. Staubitz.

Our next witness will be Mr. Robert Johnson, president, Black Entertainment Television Network.

Mr. Johnson.

Mr. JOHNSON. Thank you.

Mr. Chairman, my name is Robert L. Johnson. I am president of Black Entertainment Television. I am also a member of the board of directors of the National Cable Television Association.

I am delighted to have this oppportunity to appear before the Senate Subcommittee on Communications to comment on S. 2172, the Cable Telecommunications Act of 1982.

I want to use my testimony today to accomplish two very important objectives. One, to acquaint the subcommittee with Black Entertainment Television and, two, to challenge the subcommittee to grant my company a fair and equal chance at gaining access to cable television systems by eliminating the mandatory cable must-carry signal rules.

BET, or Black Entertainment Television, is the Nation's first and only cable satellite network providing black oriented entertainment and sports programing to cable TV households throughout the United States.

BET is an advertiser supported basic cable service that began programing January 25, 1980, and today is carried by systems in over 49 States serving over 9.1 million cable TV households.

In December 1981, BET announced its intentions to expand its programing hours to 6 hours a day, 7 days a week, beginning in August 1982. At that time, BET would provide a broad range of entertainment, cultural and sports programing targeted to the viewing interest of the black viewing public and yet attractive to all Americans.

BET's growth from 3 hours a week to 42 hours fulfills the network's commitment to provide a full range of black oriented programing. BET will cover feature films, black classic films, black college sports, gospel music, and a video concert series. Our expanded schedule will also include programing of particular interest to black women, young people, the black business and professional communities, as well as coverage of the black literary and performing arts scene. BET's business objectives are to become the major producer and distributor of black oriented programing for the cable television industry.

We believe that BET provides a valuable programing service to both the cable television operator and the black subscriber. BET's commitment to the cable television industry is to grow with it. As cable companies prepare to wire the urban markets, our expanded schedule demonstrates our intentions to continue to offer the best in black oriented programing that is attractive to all Americans.

Black Entertainment Television is a business specializing in programing for the black consumer. It could not exist today were it not for the alternative distribution created by the growth of the cable satellite industry. As a business solely dependent on advertiser revenues, it is of paramount importance that BET have access to the largest audience possible. This in turn can only be achieved by BET having access to as many cable systems as possible.

The cable television industry is ideally suited for the distribution of specialized programing services like Black Entertainment Television. BET projects that as cable television expands into the urban markets, where over 65 percent of the U.S. black population resides, that within 5 years BET will have the potential of serving over 16 million black Americans with programing targeted to their specific viewing interests.

Furthermore, because cable has a multiplicity of channel capacity, minority programing via cable can be offered without restricting other programing choices. In addition, millions of white Americans who have no access to black oriented programing could be made aware of the many cultural contributions of black Americans to our society.

As the minority entrepreneur in the cable television industry, I, and many of my colleagues have been told constantly by the Chairman of the FCC, by the Congress and indeed by the Reagan administration that the future for the minority entrepreneur lies in an unregulated and competitive marketplace. We have been informed in no uncertain terms that quotas, set-asides, and other regulatory intrusions in the free marketplace simply don't work and are economically inefficient.

The answer for the minority businessman, we are assured, is for the Government to open up the marketplace, expand the economic pie, remove entry barriers to new industries and thereby increase the opportunities for minorities to participate in a rising economy.

Needless to say, I, and many of my associates have been somewhat reluctant to embrace a theory that an open competitive marketplace is the most efficient way to insure equal opportunity for the minority businessman. This is obviously understandable since few, if any minority firms, particularly in the communications industry, start out on an equal competitive footing with the majority owned media giants.

More importantly, 200 years of economic and social discrimination which has prevented blacks from participating on an equal basis with their white counterparts in the mainstream of our economy cannot be overcome by a simple policy declaration that today everyone is equal and therefore economic competition is also equal.

In spite of my apprehensions, Mr. Chairman, about the so-called free telecommunications marketplace and the opportunities for minority participation, Black Entertainment Television is prepared to accept the challenge to compete in a fair, competitive marketplace environment if this subcommittee is willing to create a truly competitive environment for access to cable systems by eliminating the mandatory must-carry signal rules that guarantee broadcasters access to cable.

Black Entertainment Television challenges this subcommittee to remove the unnecessary and anticompetitive regulatory intervention in the marketplace that effectively gives the broadcaster an unfair advantage in gaining access to cable television systems.

Mandatory signal carriage is the direct opposite of free marketplace decisionmaking in the selection of cable programing. The cable operator's judgment about what is best for his marketplace is replaced by Government fiat designed simply to protect one communications technology from competition by another.

Black Entertainment Television challenges the subcommittee to explain the difference between a mandated set-aside channel on a cable television system for a local broadcaster and a mandated set-aside contract for a minority firm. If one is economically inefficient and contrary to the workings of the free marketplace, so is the other.

BET challenges this subcommittee to explain to me as a minority businessman willing to compete as an equal against media conglomerates for space on a cable television system why stations with more ecomomic clout than Black Entertainment Television should be given a free ride.

Finally, Black Entertainment Television challenges this subcommittee to explain why any minority company should believe that the Government is sincere when it encourages minority firms to participate in a so-called free and unregulated communications marketplace when in fact Government mandatory signal carriage policy is a clear and blatant example of Government intervention in the marketplace to protect the haves from competition from the have-nots.

The answer is that the minority entrepreneurs should not believe the Government unless there is some intellectual consistency to Federal deregulatory policy. If we believe in unregulation, let's practice it. If we believe the marketplace should determine programing, then we should let it.

In conclusion, let me restate Black Entertainment Television's challenge. BET in the true spirit of competitive entrepreneurship has established a minority owned and operated business without one Federal dollar and without one Federal regulatory crutch.

Black Entertainment Television is prepared to compete equally with any and all local broadcasters for access to the cable television viewing audience. BET wants to see the economic pie of cable programing expanded. BET wants to see total deregulation and free marketplace forces determine signal carriage.

BET's challenge to this subcommittee is that you eliminate the must-carry rules today so that you can truly open up the communications marketplace of tomorrow for all Americans.

Thank you.

[The statement follows:]

STATEMENT OF ROBERT L. JOHNSON, PRESIDENT, BLACK ENTERTAINMENT TELEVISION

Mr. Chairman. My name is Robert L. Johnson. I am President of Black Entertainment Television. I am delighted to have this opportunity to appear before the Senate Subcommittee on Communications to comment on S. 2172, the Cable Telecommunications Act of 1982.

I want to use my testimony today to accomplish two very important objectives: (1) To acquaint the Subcommittee with Black Entertainment Television. (2) To challenge the Subcommittee to grant my company a fair and equal chance at gaining access to cable television systems by eliminating the mandatory cable "must carry" signal rules.

WHAT IS BLACK ENTERTAINMENT TELEVISION

BET is the nation's first and only cable satellite network providing Black oriented entertainment and sports programming to cable television households throughout the United States. BET is an advertiser supported basic cable service that began programming January 25th, 1980, and today is carried by systems in 49 States serving over 9.1 million cable television homes. BET currently subleases three hours a week (11 p.m. to 2 a.m. EST each Friday) of programmng time on RCA Satcom III, transponder 9, from the USA Network, another cable programming service.

On December 2nd, 1981 at the California Cable Television Association Convention in Anaheim, BET announced its intentions to expand its programming hours to 42 hours per week beginning August 1982. At that time BET will provide a broad range of entertainment, cultural and sports programming targeted to the viewing interest of the Black viewing public yet attractive to all Americans. Attached for review by the Subcommittee is a BET program synopsis and program schedule.

BET's growth from 3 hours a week to 42 hours fulfills the network's commitment to provide a full range of Black oriented programming that is attractive to all members of the Black community. BET will offer feature films, Black classic films, Black college sports, gospel music and a video concert series. Our expanded schedule will also include programming of particular interest to Black women, young people, the Black business and professional communities, as well as coverage of the Black literary and performing arts scene. BET's business objectives are to become the major producer and distributor of Black oriented programming for the cable industry.

We believe that BET provides a valuable programming service to both the cable operator and the Black subscriber. BET's commitment to the cable television industry is to grow with it. As cable companies prepare to wire the urban markets, our expanded schedule demonstrates our intentions to continue to offer the best in Black oriented programming that is attractive to all Americans.

BET's new schedule will also enhance the network's attractiveness to national advertisers. The fact that BET already has over 25 national sponsors and has recently signed a multimillion dollar advertising agreement with Anheuser-Busch gives us encouragement that an expanded, prime time service will be an even more attractive ad vehicle for targeting messages to the Black consumer market.

BET believes that real diversity of services is the key for cable television in the urban markets. BET represents that diversity in that it can provide service to the more than 26 million Black Americans whose viewing interests are not adequately served by the commercial, over the air broadcasters.

WHY IS ACCESS TO CABLE TELEVISION SYSTEMS VITAL TO BET

Black Entertainment Television, as a business specializing in programming for the Black consumer, could not exist today were it not for the alternative distribution system created by the growth of the cable/satellite industry. As a business solely dependent on advertiser revenues it is of paramount importance that BET have access to the largest audience possible. This in turn can only be achieved by BET having access to as many cable systems as possible.

The cable television industry is ideally suited for the distribution of specialized programming services like Black Entertainment Television. BET projects that as cable television expands into the urban markets, where over 65 percent of the Black population resides, that within five years BET will have the potential of serving over 16 million Black Americans with programming targeted to their specific viewing interests. Furthermore, because cable has multiplicity of channel capacity, minority programming via cable can be offered without restricting other program choices. In addition, millions of white Americans who have no access to Black oriented programming could be made aware of the many cultural contributions of Black Americans to our society.

The key to achieving this diversity of minority programming and the key to the economic viability of an advertiser supported cable/satellite network is access to the consumer via cable television. As the Federal Communications Commission's Network Inquiry Staff pointed out, "If viewers are to be offered increased choices, most of these choices must be in the form of network or mass distributed programs."

BET IS WILLING TO COMPETE IN THE FREE MARKETPLACE AND CHALLENGES THE SUBCOMMITTEE TO CREATE A FREE MARKET FOR SIGNAL CARRIAGE

As a minority entrepeneur in the cable television industry, I and many of my colleagues have been told constantly by the Chairman of the FCC, by the Congress and indeed by the Reagan Administration that the future for minority entrepreneurship lies in an unregulated and competitive marketplace. We have been informed in no uncertain terms that quotas, set-asides and other regulatory intrusions in the free marketplace simply don't work and are economically inefficient. The answer for the minority businessman, we are assured, is for the government to open up the marketplace, expand the economic pie, remove entry barriers to new industries and thereby increase the opportunities for minorities to participate in a rising economy.

Needless to say, I and many of my associates have been somewhat reluctant to embrace the theory that an open competitive marketplace is the most efficient way to insure equal opportunity for minority businessmen. This is obviously understandable since few if any minority firms, particularly in the communications industry, start out on an equal competitive footing with the majority owned media giants. More importantly, 200 years of economic and social discrimination which has prevented Blacks from participating on an equal basis with their white counterparts in the mainstream of our economy cannot be overcome by a simple policy declaration that today everyone is equal therefore economic competition is also equal.

In spite of my apprehensions about the so-called free telecommunications marketplace and the opportunities for minority participation, BET is prepared to accept the challenge to compete in a fair, competitive marketplace environment if this Subcommittee is willing to create a truly competitive environment for access to cable systems by eliminating the mandatory "must carry" signals that guarantee broadcasters access to cable.

Black Entertainment Television challenges this Subcommittee to remove this unnecessary and anticompetitive regulatory intervention in the marketplace that effectively gives the broadcaster an unfair advantage in gaining access to cable television systems. Mandatory signal carriage is the direct opposite of free marketplace decision making in the selection of cable programming. The cable operator's judgement about what is best for his marketplace is replaced by government fiat designed simply to protect one communications technology from competition by another. Black Entertainment Television challenges the Subcommittee to explain the difference between a mandated set aside channel on a cable television system for a local broadcaster and a mandated set aside contract for a minority firm. If one is economically inefficient and contrary to the workings of the free marketplace, so is the other.

BET challenges this Subcommittee to explain to me, as a minority businessman willing to compete as an equal against media conglomerates for space on a cable television system, why stations with more economic clout than Black Entertainment Television should be given a free ride on cable television systems?

Why should a local station which can deliver its programs over the air be guaranteed by regulation access on cable television systems when Black Entertainment Television, which has no alternative whatsoever to deliver its programming, cannot be guaranteed similar access. BET challenges this Subcommittee to explain to the Black cable television viewers around this country who want to see the Black college football team from Senator Hollings' home state, South Carolina State College, why this programming is not available in their market—because the local cable operator must carry a local station showing reruns of I Love Lucy for the 50th time.

Finally, Black Entertainment Television challenges this Subcommittee to explain to me why any minority company should believe that the government is sincere when it encourages minority firms to participate in a so called free and unregulated communications marketplace, when in fact government mandatory signal carriage policy is a clear and blatant example of government intervention in the marketplace to protect the haves from competition from the have nots. The answer is that minority entrepreneurs should not believe the government unless there is some consistency to federal deregulatory policy. If we believe in so called unregulation or deregulation, let's practice it. If we believe the marketplace should determine what programming should be carried on a cable system then let it. If we believe that competition should be truly equal then let us encourage it by eliminating regulatory road blocks.

BROADCASTER ARGUMENTS IN SUPPORT OF "MUST CARRY" RULES ARE OUT-DATED AND ANTICOMPETITIVE

In response to the broadcaster arguments in favor of "must carry" rules, Black Entertainment Television simply does not believe you can answer this challenge for deregulation by stating cable "must carry" rules are necessary to fulfill the requirements of the 1934 Communications Act. The fact of the matter is the 1934 Communications Act never contemplated television or cable and certainly not satellite delivered programming. More importantly, and I believe we all agree, the best way to insure the rapid and efficient dissemination of telecommunications services is to let the free marketplace prevail. The exciting new video technology that is appearing on the communications horizon, from discs to DBS, is being driven by the economic incentives found in the competitive marketplace and not by a desire to pay homage to a 48 year old communications act. In short, if it is economically rewarding for a cable operator to retransmit a local broadcast signal, that signal will become a "must carry" not because of government mandate, but because of marketplace and consumer demand. If that signal happens to be BET's and not NBC's the market has made that decision, not the federal government.

BET does not believe this challenge can be answered by arguing that "must carry" rules are necessary to insure the economic survival of local public service programming—the so called localism doctrine. What business is more responsive to the local community than the local cable operator? The local government grants the franchise, sets service standards, determines rates and has the full authority to revoke the franchise if its regulations are violated. Cable operators must be responsive to the needs of the local community if they are to stay in business. Therefore, if a local signal is important to the community because it services the public interest, I submit that the cable operator will carry the signal. The cable operator will make the decision because the local regulatory authority will demand it, the public will want to view it and the cable operator will make it a "must carry."

Why do we need the federal government in Washington, D.C. to tell a cable operator in Phoenix, Arizona what he must carry? I say let the market place in Phoenix make that decision. Furthermore, what about the services that cable operators can provide to serve the local community. Should we also mandate that these new services become "must carry" because they fulfill a community need. For example, we don't have an all weather over-the-air television station in this country. There is a 24 hour weather channel for the cable television industry. We don't have an all news over-the-air television station. There are two such programming services in the cable television industry. The cable television industry with its multiplicity of channels capable of providing local origination, public access and specialized minority interest channels is localism and diversity at its best.

Finally, I don't think you can argue that the "must carry" rules exist to protect viewers who are now cable subscribers but couldn't switch to a local over-the-air broadcast signal without disconnecting from cable if the cable operator chooses not to carry that signal. First, we don't believe it is the responsibility of the government to insure that viewers have access to both cable and over-the-air television. That decision is a pure consumer choice issue involving no aspect of the public interest, convenience or necessity. More to the point, there is a simple electronic device called an A-B switch that allows a cable viewer to switch back and forth from cable television services to over-the-air services delivered via roof top or set top antenna. I'm told by cable engineers that this A-B switch is available today and costs less than four dollars. Clearly, it would seem to me that a marketplace solution to this problem already exists and is preferable to continued government intrusion in the signal carriage marketplace.

In conclusion, let me restate Black Entertainment Television's challenge. BET, in the true spirit of competitive entrepreneurship, has established a minority operated and owned business without one federal dollar or one federal regulatory crutch. Black Entertainment Television is prepared to compete equally with all local broadcasters for access to the cable television viewer. BET want to see the economic pie of cable programing expanded. BET wants to see total deregulation and free marketplace forces determine signal carriage. BET's challenge to this Subcommittee is that you eliminate the "must carry" rules today so that you can truly open up the communications marketplace of tomorrow for all Americans.

Senator **Goldwater**. Thank you very much.

Our next witness will be Mr. Robert Bilodeau, executive vice president of Suburban Cablevision, Inc.

Mr. **Bilodeau**. Good morning, Mr. Chairman, and members of the committee and staff.

My name is Robert Bilodeau, and I am executive vice president of Suburban Cablevision based in East Orange, N.J. I am the former president of the Society of Cable Television Engineers, past president of the New Jersey Cable Television Association and a member of the board of C-Span currently. And I would like to thank C-Span for that because this is the first time that my folks back home will know what I am doing in Washington.

I am here to speak against the foreign ownership restrictions of S. 2172 and particularly those detailed in section 605(b). That is my purpose here this morning. I would like to describe Suburban Cablevision to you as it relates to my argument.

Suburban Cablevision is serving 136,000 subscribers in 41 communities in northern New Jersey. We employ over 300 people in the conduct of this business. We have in excess of $50 million invested in this equipment and plant and the bulk of this was borrowed from U.S. institutions and U.S. banks and came into the U.S. economy.

Suburban has been very successful in the growth and construction of its cable television franchises and has received numerous awards at the national level, in particular awards dealing with local programing and all of those are detailed in my written testimony that has been submitted.

Once again, in 1982, recently we were made aware that Suburban received five nominations in national competition for programing awards known as the ACE awards in our industry. I say this because it does relate to the quality of the operation that we are conducting in northern New Jersey.

In 1973 I was part of a funding group of local investors in the northern New Jersey scene who set themselves up to establish a cable television business in this urban New Jersey environment, 15 to 20 miles west of New York City. We established ourselves as a local company and put our own hard-earned dollars into this business and were granted 10 to 12 franchises in our early years of 1973 and 1974, all pursuant to State regulations that were promulgated in those years to controlling and regulating cable television in the State of New Jersey.

We did have some difficulty convincing the traditional investors and other U.S. companies in joining with us in this venture in this part of the United States. Some of the same companies who were represented here testifying about the restrictions of Canadian ownership on the ownership of cable systems there were in fact not ready and willing to go ahead with us to finance and build a cable system in northern New Jersey.

At the same time, we were pursuing all of our options. One of those options was the raising of construction money and debt and additional equity from a Canadian cable company at that time, Maclean Hunter Cable TV, Ltd. We did go forward with Maclean Hunter.

We opened up negotiations with them in November 1974 and we concluded a contract with them in April 1975 and have gone forward with the Maclean Hunter operation owning a majority of Suburban Cablevision and it has been an excellent relationship and it has been a first-class system and it is there and it is an experience and it is a success story that I like to relate to the involvement of the Canadian cable television expertise and money in this country. That is the background.

I have been involved in this issue on several previous occasions. In 1975 and 1979 the FCC considered the imposition of controls on foreign ownership of cable TV in this country. In fact, I was involved even earlier than that because Suburban Cablevision was given one of the first microwave licenses to operate a station in the United States to make our large urban market system possible from the technological standpoint.

I truely believe the issue was a franchising issue. It is a vested interest competitive issue. It began that way in 1975 in northern New York State when the initial proposal for rulemaking was filed at the FCC.

In my estimation the decision as to who to marry should be a local one. I franchised personally over 50 communities in the northern New Jersey area and I did not get one adverse antisentiment comment made by a municipal official or a citizen or resident about the fact that we were controlled and owned on a majority basis by a Canadian company.

I have 136,000 subscribers, not one of which has ever written or verbally said anything that had to do with Canadian ownership. They are interested in two things. They are interested in good pictures at a reasonable price and they don't care whether the Canadians own the cable system or the Japanese or the Russians.

On the issue of reciprocity in dealing with the Canadian ownership issue, I would like to point out that if the provisions of section 605(b) are in fact enforced and become law, then presumably a Russian investment entity could purchase and own cable systems in the United States or a Japanese company or perhaps the Canadian companies that are in the States already could sell to the Russians or the Japanese. Certainly the Japanese have a lot of our money now because of the imbalance in trade and the money that has come from the automobile industry.

I think Congress should continue to encourage open and free competition in this business. There is no adverse impact at the present time of the Canadian involvement in the U.S. cable business and the public is better served by the involvement of the Canadians in the United States.

In the 13-year history of the legislation that we have made reference to in Canada that restricted U.S. ownership, there has never been an attempt by any U.S. business or by any U.S. legislative body to make any attempt to reverse that legislation in Canada. Perhaps that is long overdue, but there really isn't a business there that the U.S. interests are interested in and never has been.

I think I will conclude my comments now. You have a detailed description of these in the submitted comments.

I will submit to questions, and thank you very much for your time.

[The statement follows:]

STATEMENT OF ROBERT BILODEAU, EXECUTIVE VICE PRESIDENT, SUBURBAN CABLEVISION, INC.

I. INTRODUCTION

My name is Robert Bilodeau and I am Executive Vice President of Suburban Cablevision, Inc., located in East Orange, New Jersey. Suburban Cablevision is now largely owned by Maclean Hunter, Ltd. of Canada. Thank you for the opportunity to testify today.

Suburban Cablevision was founded in 1973 by local investors to develop cable television in the Northern New Jersey area. Today, Suburban is the largest cable company in the State and one of the largest in the nation. The outstanding growth pattern began in 1975 with the activation of the company's first subscribers in West Orange, New Jersey. Presently, more than 134,000 families in 41 municipalities are served by Suburban through its 2,400 miles of cable plant. Suburban's cable network extends through four counties, an area of 340,000 homes and over one million people. Suburban currently employs over 300 local people on its staff and provides numerous other jobs to other residents through subcontracts.

In its short history, the company has become nationally prominent. In 1977 and again in 1979, Suburban received the national industry-wide award for excellence in cable sports coverage. In 1978, Suburban received that National Cable Television Association's (NCTA) coveted ACE award for excellence in overall community programming. At that time, I was Vice President of Engineering and was honored by the NCTA with its Outstanding Engineering Achievement Award for Operations. This award is judged on innovative design, efficient application of new technology and efficient management of resources and personnel. In 1980, Suburban earned two NCTA ACE awards, one for excellence in a sports series and the other was an unprecedented second ACE award for excellence in overall community programming. In 1981 Suburban was nominated for ACE awards in seven categories and received two.

Without the commitment and expertise of Maclean Hunter, Ltd., a Canadian Corporation, Suburban would not be the showcase of cable excellence that it is today. Maclean Hunter Cable TV, Ltd., is one of the major cable television operators in Canada, having commenced operation there in 1967. In 1975, I was having great difficulty in obtaining financing from domestic sources to build a cable facility in New Jersey, a plant to be located between two major cities (New York City and Philadelphia.) Though we had already secured some dozen franchises, U.S. cable operators and other domestic financial sources would not take a chance on our proposal to build this area. The reason was that cable had proven to be, at that point in time, unprofitable in areas where there were large numbers of off-the-air television signals available. This was before the advent of pay TV and other services via satellite which have helped to make cable attractive to consumers in urban areas. As a final resort, we looked for foreign sources of financing. Fred T. Metcalf, President of Maclean Hunter Cable TV, Ltd., and a founding member and former president of the Canadian Cable Television Association, decided Maclean Hunter would finance Suburban. Because the cable industry developed differently in Canada (it was deeply rooted in utilizing local programming to attract subscribers and was more accustomed to building in urban markets) Northern New Jersey was viewed as an opportunity. Thus, in 1975, Maclean Hunter obtained controlling interest in Suburban and thereby entered the U.S. cable market. With the influx of financing, support and most of all commitment from Maclean Hunter, Suburban Cablevision was built. Maclean Hunter's participation in Suburban contributed enormously to the construction and operation of a unique cable television system.

It is, therefore, with great concern that I appear before you today to discuss the foreign ownership provisions of S. 2172. This bill proposes a modification of Section 605 of the Communications Act to add Subsection B1, which would require sectoral reciprocity concerning cable television operations. Such a policy, if it is submitted, cannot further the social or economic interest of the American public and will serve to penalize U.S. consumers, U.S. investors, and U.S. employees. It also contradicts 300 years of U.S. investment policy.

Restrictions on foreign ownership of cable television systems really mean restrictions on Canadian ownership. Every cable system in this country operated by a foreign national is operated by a Canadian company. Over the years, the foreign ownership issue has been used as a facile attempt by a small number of U.S. cable companies to curb competition for franchises by Canadian companies. The history of this issue and the inappropriateness of amending the Communications Act to implement an anticompetitive result demonstrates that the proposed foreign ownership provisions are unnecessary and unprecedented.

II. HISTORY

In 1975, the Federal Communications Commission was presented with the question of whether there should be a restriction on foreign ownership of cable television. After conducting rulemaking proceedings on the issue, the Commission refused to adopt such restrictions. In unanimously refusing to impose ownership restrictions, the Commissioners found that:

1. There was no threat to the security of the United States.
2. Cable operators have only minor content control over the programming they distribute.
3. Foreign ownership restrictions do not generally apply to communications, e.g., TV networks, newspapers, wire services, etc. are not restricted.
4. It is the local jurisdictions that are in the best possible position to determine whether or not an individual operator's nationality will prevent him from satisfying his public interest obligations.
5. In the absence of demonstrable harm and where benefits may result the Commission is inclined to allow free market forces to determine the direction of capital flow within the industry.

Again in 1979, the Commission was asked to review the need for foreign ownership restrictions on cable television. And again, the Commission concluded that such restrictions were unnecessary, stating:

"At this time it is difficult for us to perceive how the television viewing public would benefit in any way from the regulation requested. Rather it would appear that such a restriction would merely promote the self interests of the domestic cable television industry at the expense of additional competitive alternatives for the public in the franchising process."

The Federal Communications Commission is the administrative body which possesses expertise in communications matters. It has conducted indepth analyses of the foreign ownership issue twice and developed unequivocal conclusions that foreign ownership restrictions are unnecessary.

III. RECIPROCITY

Those U.S. Companies desiring to keep Canadian companies out of the U.S. marketplace employ the "reciprocity" argument presumably because it has more appeal politically than does a per se ban on foreign ownership; but it would achieve the same purpose. If passed, it would proscribe Canadian companies from the U.S. market because the Canadian Government, in 1969, strictly limited foreign ownership of cable facilities. (U.S. companies can own only 20 percent of a cable system in Canada).

The Canadian Government's action occurred because by 1967 nine of the ten largest cable companies in Canada were controlled by foreign owners. The nine foreign controlled companies accounted for over 95 percent of the subscribers serviced by the top ten companies in Canada. Foreign interests controlled 50 percent of the largest 50 companies and about 75 percent of the total subscribers served by that group in Canada. In short, cable television was dominated by foreign interests. For that matter, all of Canadian industry was, and is so dominated, but cable was placed in a different context.

As early as 1928, Canada's nationwide broadcasting policies stressed the vital role of radio knitting together a vast and sparsely populated country, with two founding cultures—English and French. A long series of legislative, executive and administrative actions constructed through both radio and television a Canadian public policy *framework emphasizing the national cultural interest and creating the Canadian* Broadcasting Corporation. United States domination of cable in Canada was seen as a real threat to the country's cultural survival, i.e., there was an encroachment of U.S. culture via cable TV. Finally, specific aims of the Cnadian Broadcasting Act were perceived as not being met by the U.S. companies, for example: To offer service in both English and French, to balance information and entertainment programming, to emphasize Canadian-oriented programs. The development of Canadian cable television and the Canadian government's fears of cultural implications from U.S. television has no counterpart here.

While U.S. companies dominated the Canadian cable industry, only a miniscule portion of U.S. subscribers are served by Canadian companies. Today, Maclean Hunter is the second largest Canadian cable operator in the United States and the subscribers it serves represent far less than 1 percent of the total number of U.S. subscribers.

It is also highly questionable that reciprocity is, in fact, desired by U.S. cable companies. Canada is 80 percent saturated with cable. There is no potential market for United States or, for that matter, Canadian companies to build new systems in Canada. Thus, while reciprocity sounds good to some, it has no counterpart in reality. The real aim of some U.S. companies is less competition. In this regard, it should be noted that the "reciprocity" issue was never broached by the U.S. industry in 1975 when the foreign ownership issue was first considered by the FCC. Further, U.S companies have made no attempt in the last dozen years to seek Canadian legislation which would allow increased U.S. participation in the Canadian cable industry.

IV. SUBSTANTIVE ISSUE

The proposed legislation is unnecessary and unprecedented.

Anticompetitive

Restrictions on foreign ownership in the area of cable television is a call for federal government protection against competition—a ploy by a few U.S. companies to use the governmental process to eliminate Canadian companies from local franchise proceedings. Government policy favoring and enforcing competion runs in the opposite direction. any restriction of foreign ownership of a cable system would be an overraction to hypothesized dangers. Canadian presence has been positive; Canadian companies have substantively and positively contributed to the U.S. cable industry and the American public, as has been recognized by a large majority of U.S. cable systems through the National Cable Television Association.

Local issue

Cable television's local distribution system uses local streets and ways and the selection of the operator has thus been a local choice since the industry started. National policy should continue local choice of cable television operators. Each cable company has to convince the local authority that its proposal—including questions of citizenship, experience, integrity and financial capability—is best for the community. This is a determination that can be most appropriately made at the local level, where the cable company's physical presence in the community is observed daily.

The relationship of the cable system to the community is always governed by a detailed franchising ordinance or set of state laws. Renewal of permission to operate is dependent on compliance with these contracts and laws; thus, there is a strong dependency on local authorities by cable companies, a dependency which broadcasters, for example, do not have Local control is thus pervasive to the cable company, and restriction on foreign ownership by the federal government would be a warrantless intrusion on the local prerogative of choosing the cable operator most suitable for the particular community. As we see more and more Administration and Congressional initiatives to restore power and control, in many areas, to local jurisdictions, it is anomalous to be considering federal pre-emption of this long-standing local matter.

Employment and spending

Canadian companies operating in the United States employ U.S. citizens for over 95 percent of their staffing requirements. Suburban itself has 300 staff members, 299 of them U.S. citizens. The overwhelming number of dollars generated by Canadian cable companies are reinvested in these U.S. operations and are spent with U.S. businesses. The cable systems operated by Canadian companies in the United States provide unquestionable employment and economic benefits to American citizens and the American economy. Canadian dollars are invested in the U.S. economy and are spent to purchase U.S. capital goods and services, helping to achieve a desirable balance of trade.

V. AMENDMENT OF SECTION 605 WOULD NOT SERVE THE PUBLIC INTEREST

In testimony before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Energy and Commerce Committee on March 3, 1982, Ambassador William E. Brock III, United States Trade Representative, indicated that the administration has serious reservations regarding the use of sectoral reciprocity as a tool in facilitating U.S. exports. The Administration is committed to removing impediments to trade whether imposed by foreign governments or self-imposed. In this context, it does not believe "sectoral reciprocity would be a useful tool. A narrow sectoral approach to trade negotiations could not be productive. Instead, we have negotiated agreements with our trading partners over a broad range of sectors, with an overall balance of concessions." Sectoral reciprocity may upset what over the years has developed into one of this country's most beneficial trade and investment partnerships. Additionally, it should be noted that we are not dealing here with "mere" trade—we are dealing with foreign investment. While trade policy has been subject to tariffs and quotas and other adjustments throughout our history, we believe that it would be wholly unprecedented to preclude foreign investment by nationals of a friendly foreign nation.

CONCLUSION

The U.S. international investment policy is based on the fundamental belief that the investment process works most efficiently in the absence of governmental intervention. Foreign investment, like its domestic counterpart, increases productivity, income and employment in the United States. It is, therefore, in the best interests of the United States to allow free market forces to determine the direction of worldwide investment flows and to encourage the lowering of barriers restricting international investment. Raising U.S. barriers to foreign investment on a bilateral "reciprocal" basis, in direct opposition to this policy, would not serve this country.

The thrust of Congressional activity in the last two years in the area of telecommunications has been to encourage competition and to allow competition to serve, wherever possible, as a substitute for regulation. Cable television, through efforts by the Congress and the Federal Communications Commission, has achieved significant deregulation in the past couple of years. The foreign ownership provisions found in the restrictions advocated by those who espouse the "reciprocity" argument will merely serve to lessen competition for local franchises. There has been no public harm caused by any foreign cable television operation in the United States, in fact, the public has benefitted significantly. The choice of the cable operator has always been and should remain a matter of local concern, particularly when no national policy of the U.S. would be furthered by restricting Canadian ownership.

The annual resurrection of the cable television foreign ownership issue is becoming a wearisome tactic of a limited number of U.S. cable companies wishing simply to lessen the competition for cable television franchises. There is no justification in a reciprocity argument—it is no more than an unpersuasive disguise for anticompetitive behavior. The amendment to the Communications Act would serve only the end of a few U.S. cable companies while significantly encumbering the Federal Communications Commission with a duty it is not well suited to perform. Canadian companies have contributed to the livelihood and wellbeing of hundreds of thousands of Americans through their U.S. cable operations. To sever these benefits would be a gross injustice to the American public and the country's national trade and investment policy.

Senator **GOLDWATER**. Thank you.

All of your statements will be made a part of the record just to make sure we have got everything you wanted to say.

Our last witness is Mr. Wiles Hallock, chairman of the NCAA Football Television Committee and executive director of the Pacific-10 Conference.

Mr. Hallock.

Mr. **HALLOCK**. Thank you very much, Mr. Chairman, and good afternoon, ladies and gentlemen.

I am Wiles Hallock, executive director of the Pac-10 and chairman of the NCAA Football Television Committee, and I am appearing today on behalf of the National Collegiate Athletic Association which represents 753 4-year colleges and universities, 81 allied collegiate conferences, and 69 associated institutions and affiliated organizations.

I appreciate very much the opportunity to be able to speak for the association at this hearing.

My purpose is to ask the subcommittee to assist in resolving a longstanding problem caused by a cable carriage of distant signals of a special kind of college football game telecast.

Although colleges and universities are affected generally by cable retransmissions of telecasts of their sports events in much the same ways as are professional sports clubs, we do not ask for the kind of broad protection that section 616 of S. 2172 would offer professional sports.

We know that cable systems will object strenuously to any such protection as they have to that sought by the professional clubs. Instead, we seek relief from a single specific problem, cable television retransmissions of NCAA members' so-called exception football telecasts, where the colleges are suffering demonstrable harm and where there is a solution that does not prejudice cable interests. In fact, we believe it helps them.

Before I outline our proposal, it is necessary to describe what exception telecasts are under the NCAA's football television plan, first adopted by NCAA members in 1952 and periodically revised, and readopted by overwhelming votes of the NCAA membership in the 30 years since.

Television is a mixed blessing to college athletics. Experience has demonstrated that the local television presentations of a conflicting live sports event will often substantially diminish in-person attendance at local college games. Gate receipt revenues, however, particularly from the sport of football, provide support essential to the maintenance of many college athletic programs in toto. The overwhelming preponderance of which do not operate at a profit.

On the other hand, controlled presentation of college football games on television increases public interest in the colleges 'programs, positively affecting both athletic event, and institutional admissions, and contributions, and providing another source of needed revenues.

NCAA member institutions and conferences therefore endeavor to strike a balance between maximizing the use of telecasting opportunities and minimizing the impact of such telecasts on other colleges and universities whose programs they recognize a responsibility to avoid damaging.

The key to striking this balance is the ability to measure and control the impact which essentially means the geographical coverage of telecasting arrangements.

There are a few specific exceptions to the limitation on telecasts of college football games outside of the national network series. These exceptions permit the local nonnetwork broadcast of certain games over a single television station or in some cases a limited number of stations and two principal exceptions are the sellout and 400-mile exceptions.

For games that are sold out or are conducted at locations more than 400 miles from the visiting team's campus an exception telecast may be authorized if there is no concurrently conducted college game within 120 miles of the telecasting site for a VHF broadcast or within 45 miles for a UHF broadcast.

A sellout exception telecast is permitted both in the area in which the game is played and at the visiting team's homesite. Whereas a 400-mile exception telecast is allowed only at the visiting team's home site.

These local exception telecasting opportunities are of great value to the colleges because they provide an important opportunity to serve and develop local interests and to generate needed revenues. Approximately 60 exception football telecasts were authorized during the 1980 college season.

Importantly, even if otherwise qualifying, no exception telecasts will be authorized if there is cable system retransmission of the broadcast beyond the 120-mile radius. A UHF telecast will not be authorized if there is cable carriage in conflict with a college game scheduled to be played at a location between the 45 and 120-mile radius.

These restrictions were imposed a number of years ago when it became clear that cable systems were capable of carrying exception telecasts hundreds and even thousands of miles from the site of the broadcasting station, well beyond the radius clear of conflicting games and into distant areas where other college games were being played.

In recent years as cable system have multiplied and imported distant broadcast signals from increasing distances, the ability of NCAA members to make exception telecasts has steadily eroded. Many now find that they cannot make the exception telecasts at all. For example, telecasts of the traditional intrastate rivalries between Arizona and Arizona State and Utah and Brigham Young Universities are now precluded by cable carriage. Ohio State and the University of Arkansas are among the many institutions that are essentially unable to arrange any exception telecasts of their games.

Other institutions find that they can make an exception telecast only if one or more cable systems can be persuaded to agree not to carry the telecast, which is an awkward circumstance for both the colleges and the cable systems concerned.

In order to remedy this situation and to increase the number of college football games now appearing on television, we ask the subcommittee to incorporate in S. 2172 a provision limiting cable carriage of these special limited college football telecasts beyond a 120-mile or 45-mile radius from the transmitting station, depending upon whether a UHF or VHF station is involved. This limitation would apply only to live, nonnetwork television broadcasts of regular season college football games between teams representing 4-year colleges or universities.

It is important to reemphasize that this provision will not disadvantage cable systems in our opinion. In instances where there might otherwise have been cable retransmissions beyond the proposed limits, no broadcast would have been authorized under the NCAA television plan and thus no cable carriage would have been possible.

A similar provision was recently incorporated, to the best of our knowlege, without opposition by the cable industry in H.R. 5949, a bill that addresses the pending cable television issues by amending the cable provision of the Copyright Act, recently reported favorably by the House Judiciary Committee.

So in summary, the purpose and necessary effect of this proposal is to make possible telecasts that are now precluded, thus increasing: colleges' access to broadcast television; the number of college football telecasts available for retransmission by cable systems within the authorized area; and the availability of college football to the television viewing public.

I would be glad to answer any questions that you have.

[The statement follows:]

STATEMENT OF WILES HALLOCK, CHAIRMAN, 1982 NCAA FOOTBALL TELEVISION COMMITTEE AND EXECUTIVE DIRECTOR, PACIFIC-10 CONFERENCE

I am appearing today on behalf of the National Collegiate Athletic Association ("NCAA"), which represents 753 four-year colleges and universities, 81 allied collegiate conferences, and 69 associate institutions and affiliated organizations. My purpose is to ask this subcommittee to assist in resolving a long-standing problem caused by cable carriage of distant signals of a special kind of college football game telecast.

Although colleges and universities are affected generally by cable retransmissions of telecasts of their sports events in much the same way as are professional sports clubs, we do not ask for the kind of broad protection that Section 616 of S. 2172 would offer professional sports. We know that cable systems would object strenuously to any such protection, as they have to that sought by the professional clubs. Instead, we seek relief from a single, specific problem—cable television retransmissions of NCAA members' so-called "exception" football telecasts—where the colleges are suffering demonstrable harm, and where there is a solution that does not prejudice cable interests.

Before I outline our proposal, it is necessary to describe what "exception" football telecasts are. That, in turn, requires an explanation of the impact of television on college football and the NCAA's Football Television Plan, first adopted by NCAA members in 1952 and periodically revised and re-adoped by overwhelming votes of the NCAA's membership ever since.

Television is a mixed blessing to college athletics. Experience has demonstrated that the local television presentation of a conflicting live sports event will often substantially diminish in-person attendance at local college games. Gate receipt revenues, however, particularly from the sport of football, provide support essential to the maintenance of many college athletic programs, the overwhelming preponderance of which do not operate at a "profit." On the other hand, controlled presentation of college football games (and other sports) on television increases public interest in the colleges' programs, positively affecting both athletic event and institutional admissions and contributions, and provides another source of needed revenues. NCAA member institutions and conferences therefore endeavor to strike a balance between maximizing the use of telecasting opportunities and minimizing the impact of such telecasts on other colleges and universities, whose programs they recognize a responsibility to avoid damaging. The key to striking this balance is the ability to measure and control the impact—which essentially means the geographical coerage—of telecasting arrangements.

In college football, NCAA members voted to adopt a television plan to provide the widest possible coverage of college football and to afford access to network television to the maximum number of colleges and universities, while at the same time mitigating the impact of telecast games on in-person attendance at nontelevised games. The plan provides for a series of a specific number of network telecasts, generally consisting of a single Saturday game broadcast nationwide on some weeks, and a group of regional games on other weeks. In the past this series was carried by a single national network; for the next four years it will be carried by two. All other telecasts (network on non-network) are strictly controlled by the television plan, in an effort to reduce the number of telecast events impacting attendance at non-telecast college games, and thus limit the damage that the live telecasts do to the gate at those games.

There are a few specific "exceptions" to the limitation on telecasts of college football games outside of the national network series. These exceptions permit the local, nonnetwork broadcast of certain games over a single television station (or in some cases a limited number of stations). The two principal exceptions are the "sold-out" and "400-mile" exceptions. For games that are sold-out or are conducted at locations more than 400 miles from the visiting team's campus, an "exception" telecast may be authorized if there is no concurrently conducted college game within 120 miles of the telecasting site for a VHF broadcast, or within 45 miles for a UHF broadcast. A sold-out exception telecast is permitted both in the area in which the game is played and at the visiting team's homesite, whereas a 400-mile exception telecast is allowed only at the visiting team's homesite.

These local, "exception" telecasting opportunities are of great value to the colleges, because they provide an important opportunity to serve and develop local interest, and to generate needed revenues. Approximately 60 "exception" football telecasts were authorized during the 1980 college season.

Importantly, even if otherwise qualifying, no "exception" telecast will be authorized if there is cable system retransmission of the broadcast beyond a 120-mile radius. A UHF telecast will not be authorized if there is cable carriage in conflict with a college game scheduled to be played at a location between the 45 and 120-mile radius. These restrictions were imposed a number of years ago, when it became clear that cable systems were capable of carrying exception telecasts hundreds, and even thousands, of miles from the site of the broadcasting station, well beyond the radius clear of conflicting games and into distant areas where other college games were being played. In recent years, as cable systems have multiplied and imported distant broadcast signals from increasing distances, the ability of NCAA members to make exception telecasts has steadily eroded. Many now find that they cannot make exception telecasts at all. For example, telecasts of the traditional intrastate rivalries between Arizona and Arizona State and Utah and Brigham Young are now precluded by cable carriage. Ohio State and the University of Arkansas are among the many institutions that are essentially unable to arrange any exception telecasts of their games.

Other institutions find that they can make an exception telecast only if one or more cable systems can be persuaded to agree not to carry the telecast, an awkward circumstance for both the colleges and the cable systems concerned. It even has been reported that Notre Dame has paid certain cable systems not to carry exception telecasts of its games, in order to qualify to make exception telecasts.

Still other institutions whose games have been the subject of exception telecasts in recent years, including the universities of Arizona, Hawaii, Louisville, New Mexico, Tennessee and Wyoming and Louisiana State may soon find that growth of cable systems and increasing cable retransmissions have foreclosed their exception telecasting opportunities as well.

In order to remedy this situation and to increase the number of college football games now appearing on television, we ask the Subcommittee to incorporate in S. 2172 a provision limiting cable carriage of these special, limited college football telecasts beyond a 120-mile or 45-mile radius from the transmitting station, depending upon whether a UHF or VHF station is involved. This limitation would apply only to live, nonnetwork television broadcasts of regular season college football games between teams representing four-year colleges or universities.

It is important to remember that this provision will not disadvantage cable systems. In instances where there might otherwise have been cable retransmissions beyond the proposed limits, no broadcast would have been authorized under the NCAA television plan and thus no cable carriage would have been possible. A similar provision was recently incorporated—to the best of our knowledge without opposition by the cable industry—in H.R. 5949, a bill that addresses the pending cable television issues by amending the cable provision of the Copyright Act, recently reported favorably by the House Judiciary Committee.

The purpose, and necessary effect, of this proposal is to make possible telecasts that are now precluded, thus increasing: colleges' access to broadcast television; the number of college football telecasts available for retransmission by cable systems within the authorized area; and the availability of college football to the television-viewing public.

I would be glad to answer any questions that the subcommittee may have.

Senator GOLDWATER. Thank you very much, Mr. Hallock.

Senator Schmitt.

Senator SCHMITT. Thank you, Senator.

Mr. Staubitz, the key section in this bill probably is the provision dividing regulatory authority between the Federal Government and the States. Please tell us whether you believe the division in S. 2172 is appropriate.

Mr. **Staubitz**. What we are looking at as far as regulation, we feel that it depends on the franchise that is negotiated. As far as regulation on the local level, it depends on what regulation you are talking about. Are you talking about rates or are you talking about public access? No; not on the local level.

Senator **Schmitt**. Well, S. 2172 permits non-Federal authorities to regulate basic subscriber rates and rates charged by programers for public, educational, and Government access channels. The bill prohibits, on the other hand, regulation of rates charged programers for the use of leased channels. Do you agree with this division of rates?

Mr. **Staubitz**. No, sir. I do not agree with the provision of rates, rate regulation. I think Hobbs, N. Mex., is a very good example. We are not regulated whatsoever in Hobbs. There is nothing in the franchise stating that we should have a public access channel. At one time we did have a public access channel in Hobbs, but the mayor says get it out, nobody uses it anyway and put something on that we can watch. The subscribers were extremely happy when we replaced that with WTBS Atlanta.

Senator **Schmitt**. S. 2172 does not specifically discuss regulation of installation rates or regulation of rates for enhanced services such as data transmission. Tom, who, if anyone, should regulate those rates? You are saying let the marketplace do it?

Mr. **Staubitz**. Exactly. I am saying let the marketplace do it. There are several other cable systems that are not regulated. My basic rates in Hobbs, I have not increased my basic rates since April 1, 1978, which is 4 years and, what, about 40-percent inflation ago that I have not increased my basic rates because of the fact that the number of subscribers on that cable will turn me more of a gross. Rather than charging, say, $15 a month per subscriber, I would rather charge $9 a month and keep it at that rate.

Senator **Schmitt**. Do you believe it would be appropriate to require municipal licenses for other providers of communications services in order to parallel the franchising requirements imposed on cable systems?

Mr. **Staubitz**. Yes; by all means, because we are required to negotiate a franchise with the city and there is no reason why other communications entities shouldn't negotiate with the city government for any licensing.

Senator **Schmitt**. You think a local radio station or a local TV station ought to negotiate a license?

Mr. **Staubitz**. No; not necessarily because that is our competition, a local TV station, radio or movie theater or what have you, no.

Senator **Schmitt**. Thank you, Mr. Chairman.

Senator **Goldwater**. Before I ask questions, Mr. Johnson, I am very sympathetic to your problem and I will make it clear that when they write the report and the final legislation that I would like to ask you to stay in touch with our staff and the staff will stay in touch with you because, as you can recognize, your problem is not one we can really quickly solve with words. I don't know whether we should leave it up to a regulatory body. I would rather leave it up to commonsense. So you can help us a lot if you will give your ideas to the staff.

Mr. **Johnson**. I would be delighted to stay in touch with the staff. I think the point is again that if you are talking about H.R. 5949, which is sort of the copyright arrangement that is being negotiated, it is really not a copyright issue. It is a communications issue as to whether or not cable operators are mandated to carry broadcast signals, and that should be addressed as a communications policy and not as a copyright policy.

As you know, I am a member of the NCTA board and obviously this is something the industry supports and I support the concept of a negotiated settlement of this issue. But it is being done by people who are already on the inside. I want to be on the inside as well, and I am saying that we want to compete openly and equally.

We have taken that route from the very inception of our company and now there is no way a broadcaster who has an alternative way of delivering his signal, that is, over the air, should have a free ride on a cable system when there is absolutely no way Black Entertainment Television can get its signal into the home except by cable and why that broadcaster should have a mandated spot on the cable system when I have no spot at all.

Senator **Goldwater**. Thank you.

Senator **Schmitt**. Mr. Chairman, I would presume that if that bill begins to move and it comes over here we will get jurisdiction over at least that section; is that correct?

Senator **Goldwater**. Well, of course, there is a lot of confusion around copyright and communications. The Judiciary Committee in the House is now considering a bill relative to copyright. The whole thing is confused and I hope the Judiciary Committee can make a sensible bill out of it so that we can do away with the need of consideration of copyright.

Senator **Schmitt**. Thank you.

Senator **Goldwater**. Mr. Turner, you mentioned in your statement that the sports franchise values, team attendance figures and so forth, were all increasing. Would you like to amplify that statement?

Mr. **Turner**. Well, sir, it is a matter of public record and I think in my written testimony I have quoted numerous examples of franchises that have traded at record prices in the past couple of years.

It was interesting to see who is making the purchases, for instance. The Chicago Cubs, which is historically one of the worst teams on the field, kind of like the Braves have been until just recently, was bought by the Chicago Tribune last year, which is a billion-dollar company, for $20 million cash, and the Phillies sold for $30 million I think just in the last few months prior to the start of this season, and Taft Broadcasting which is a multihundred million-dollar corporation, was the primary purchaser there. The Mets recently sold for over $20 million to Doubleday, which is one of the largest publishing companies in America. So those are just three examples of what I was discussing.

Senator GOLDWATER. Is it your feeling that sports generally, and I am talking about professional sports, have benefited by the broadcasts of their games or have they been hurt?

Mr. TURNER. Oh, absolutely, broadcast is a tremendous revenue producer. As far as the problems, professional sports, particularly baseball and basketball, two sports that I am involved with, have tremendous problems, but these problems are basically caused by the greed of the richer teams who can afford to pay the outrageous salaries that they are paying, like the Mets just paid George Foster $2 million a year. The Reds couldn't afford to do that and that is why the Cincinnati Reds traded him. The man that owns the Lakers paying Magic Johnson $1 million a year for 25 years. I mean the Hawks and Braves can't afford those sort of salaries. So the big-name talent is gravitating toward the major markets with the large television revenues and also the large, paid TV potential.

I have all along in both those leagues advocated the same sort of revenue sharing that the NFL has where Green Bay or smaller Kansas City has virtually the same economic base as the Los Angeles Rams teams do so that everyone can have about the same amount of money to pay salaries. That equalizes it a bit, but the richer teams want no part of that. So the disparity is growing.

I have offered in part of that revenue sharing to share the revenues that we are getting off the superstation without the superstation carriage. You have got to remember that it wasn't me that created the compulsory license or the rules under which we are operating. They were created by the FCC and the Congress years ago and all we did was take advantage of those rules, those Federal Government rules, and we haven't broken any rules, to create a fourth and lately a fifth network to compete with the crummy lowest denominator programing of the other networks.

As you well know, there has been an ongoing battle by those broadcasters and those networks. I must make one point. Bob Johnson's point about the must-carry rules, those must-carry rules should be dropped. They were forced in by the broadcasters years ago when there were no national services like Cable News Network. Cable News Network is not carried in a number of markets because of the number of mustcarries. Local signals have to be carried and it leaves no room for national signals which were not even in existence.

The terrible part about it is that those local signals are available over the air and with a simple $1 switch, which the cable industry would be more than willing to provide, it would give greater program diversity.

I filed with the FCC, oh, close to 2 years ago to ask them to strike down the must-carry rules as discriminatory and not just against Black Entertainment Television, but against Cable News Network, and the superstation, and all the other new national services, and the FCC hasn't even taken it up. They haven't even put it on the agenda, although it is definitely discriminatory.

The NAB has forced it into the compromise agreement between the three big guys over in the House Copyright Committee, and it is about to be, if that bill passes, written into Federal law when it should be struck down as discriminatory.

Senator GOLDWATER. One more question. If we liberalize the blackout rule or even did away with it, would this cause the bankruptcy of some of our athletic teams?

Mr. TURNER. No, sir; the current rules were come up by the FCC and the Congress over a lengthy period of study. The attendance at baseball games is at an all-time high and has risen with the growth of cable. There is absolutely no correlation that has ever been proven. In fact, the studies that the FCC did years ago show that there is no correlation to attendance and cable penetration in a market.

I can give you a perfect example. Jim Fitzgerald, the owner of the Milwaukee Bucks, is a friend of mine obviously through the NBA and he has a number of cable systems in Wisconsin around Milwaukee. He said he has to carry the superstation because the cities demand it because it is such a popular channel, but he intends to put the Milwaukee Bucks on pay in all those systems and he wished he didn't have to have the Hawks game there so that the only games that people would have, they get charged $2, or $3, or $4, or $5 per game, and there would be no competition to the Milwaukee Bucks.

But he is still going to charge for the games just like everyone else. All the sports teams, or the majority of them, already have pay entities going and they just don't want any competition at all, and that is not right in my opinion.

Senator GOLDWATER. I want to thank you gentlemen very much for your testimony.

We will call the next and final panel. Mr. John Gwin, the president of Oak Communications; Mr. Don Franco, president of Microband; Mr. Marshall M. Carpenter, Jr., president of Neighborhood Television Co.; Mr. John Raines, chairman of the National Satellite Cable Association; and Mr. Philip Merrill, chairman of the National Association of MDS Service Co.

Gentlemen, would you be seated.

Gentlemen, because time has sort of run over and I know you have engagements, and none of you has eaten lunch, and I have a 1 o'clock appointment, I will tell you again that we will put your complete statements in the record. These three lights, while I kind of overlook them, they are the 5-minute lights. I probably will not have a chance to ask you questions, but we may submit questions to you that you can answer at your own leisure.

So we will start off with Mr. John Gwin.

STATEMENTS OF JOHN P. GWIN, PRESIDENT, OAK COMMUNICATIONS, INC.; DON FRANCO, PRESIDENT, MICROBAND; MARSHALL M. CARPENTER, JR., PRESIDENT, NEIGHBORHOOD TELEVISION CO., INC.; JOHN RAINES, CHAIRMAN, NATIONAL SATELLITE CABLE ASSOCATION; AND PHILIP C. MERRILL, CHAIRMAN, NATIONAL ASSOCIATION OF MDS SERVICE COMPANIES, AND VICE PRESIDENT, AMERICAN CABLE TELEVISION, INC.

Mr. GWIN. Mr. Chairman, my name is John Gwin and I am president of Oak Media Development Corp. and executive vice president of Oak Industries.

I appreciate the opportunity to comment on a bill of which I am in favor, S. 2172.

I believe my own personal background provides a unique perspective from which to view the issues facing this subcommittee. Involved in CATV for the past 20 years, I have been with Oak for the last 4 years and was vice president of Cox Cable and owned my own private cable companies prior to joining Oak. I was also chairman and acting president of the National Cable Television Association.

Oak has an interest in all segments of the television industry. It is the industry leader in over-the-air subscription television service, with operating STV systems in the Los Angeles, Chicago, Phoenix, Miami, and Dallas/Fort Worth markets. We have about 600,000 subscribers, which is approximately 40 percent of all STV subscribers in the Nation.

We are also a major supplier of STV and cable television equipment and spend millions of dollars on research and we have been involved with the operation of two small cable television systems.

In order to take advantage of the tremendous growth opportunities in the pay television market, we are continually making judgments on various delivery systems, STV, MDS, cable, and new technologies such as DBS, direct broadcast by satellite.

The public's appetite for premium pay programing shows no signs of abating. Although cable television is the major conveyor of pay programing, it by no means enjoys a monopoly. Other forms of pay television are in vigorous competition with cable.

For example, there are 29 operating STV systems in 18 television markets. The FCC's rules authorizing low-power television service allow these stations to operate as STV systems without any specific FCC approval. There are more than 5,000 low-power applications, none of which are from our company, in front of the FCC today, and a large number of these envision STV service.

In addition to STV, there are approximately 194 licensed MDS systems which provide yet another opportunity for Americans to buy pay programing. Video cassettes and discs are a reality. DBS is just over the horizon.

As Oak knows from firsthand experience, in many markets there are already several options available to a consumer who is willing to subscribe to a pay service for entertainment and information not available over conventional broadcast channels. All this goes to show that the pay video marketplace is large.

There is indeed competition developing, even some which will directly impact Oak's own operations, but we are not asking for the Government to help us out. Consequently, we do not endorse, and in fact we oppose, restrictions on legitimate enterprise in order to protect the status quo. Any other course will retard the development of American technology. As you know, other countries stand ready to step in when we show signs of standing still.

Only if pay services are allowed to compete freely with each other in the open marketplace will the best and most efficient means of satisfying the public emerge. Thus, the pay television industry as a whole suffers if unnecessary shackles are placed on any component of it.

As an example, just a few years ago all three networks were the leaders of vigorous opposition to the development of pay TV and made many claims that it would put them out of business or impact their ability to serve the public. Today as the marketplace has made its own determination in favor of pay TV, the networks have not suffered, and in fact each network has formed its own pay TV division to take part in this exciting business.

Further, on the purely technical side, improvements in one area may be of value in others. For example, the advances which Oak has pioneered in addressable subscription TV technology is now available to cable television and is being used by the same.

I believe that S. 2172 is a step in the right direction. For the first time, Congress would articulate a national policy in favor of the expansion of cable communications. For too many years the growth of new types of communications was retarded by regulation which treated the newcomers as unwanted stepchildren in favor of more established services.

The declaration of purpose in the bill is necessary to prevent protection by the older established technologies from competition by energetic newcomers. We endorse it.

Cable itself has suffered from its exposure to two levels of government regulation, and more recently from very unnecessary municipal franchising demands.

In my judgment, this bill goes a long way toward rectifying the situation by clearly spelling out the areas of Federal as opposed to State and local responsibility and by eliminating the dangers of overregulation at all levels, particularly with respect to State and local governments.

Thank you.

[The statement follows:]

Statement of John P. Gwin, President, Oak Media Development Corp.

Mr. Chairman and members of the subcommittee, my name is John Gwin. I am President of Oak Media Development Corporation, a subsidiary of Oak Industries, Inc., and I appreciate the opportunity to be here today to offer my views on S. 2172, the "Cable Telecommunications Act of 1982."

I believe that my background provides a unique perspective from which to view the issues facing this subcommittee. Involved in CATV for the past twenty years, I have been with Oak for the last four years and was Vice President of Cox Cable Communications and of my own private cable companies prior to joining Oak. I also served as Chairman and President of the National Cable Television Association.

Oak has a proprietary interest in all segments of the television industry. It is an industry leader in over-the-air subscription television service, with operating STV systems in the Los Angeles, Chicago, Phoenix, Miami and Dallas/Ft. Worth markets. As of year-end 1981, we had about 600,000 subscribers—approximately 40 percent of all STV subscribers in the nation. Oak is also a major supplier of STV and cable television equipment and has been involved in the operation of two cable systems.

In order to take advantage of the tremendous growth opportunities in the pay television market, we are continually making judgments on various program delivery systems including STV, MDS, cable and newer technologies such as direct broadcast satellite service. Both I personally and Oak have been heavily involved in pay television since the industry's beginning.

The public's appetite for premium pay programming shows no sign of abating. Although cable television is the major purveyor of pay programming, it by no means enjoys a monopoly. Other forms of pay television are in vigorous competition with cable.

For example, there are twenty-nine operating STV systems in eighteen television markets, including one low-power television station. The FCC's rules authorizing the new low power television service allow these stations to operate as STV staions without any specific FCC approval. There are more than 5,000 low-power applications pending before the FCC, a large number of which envision STV service.

In addition to STV, there are approximately 194 licensed multipoint distribution systems which provide yet another opportunity for Americans to buy pay programming. Video cassettes and discs are a reality, while direct-to-the-home satellite transmissions are just over the horizon.

As Oak knows from firsthand experience, in many markets there are already several options available to the consumer who is willing to subscribe to a pay service for entertainment and information which is not available over conventional broadcast channels.

All this goes to show that the pay video marketplace is large. It is expanding. Cable, with its ability to offer multiple channels, has a built-in advantage; however, the temendous costs of laying cable, particularly in sparsely populated areas of the country, as well as the delays franchising in many major markets, means that there is plenty of opportunity for other pay systems to develop and compete.

There is indeed competition developing, even some which will directly impact Oak's operations, but we are not asking for the government to help us out. Consequently, we do not endorse—in fact, we oppose—restrictions on legitimate enterprise in order to protect the status quo. Any other course will retard the development of technology. As you know, other countries stand ready to step in when we show signs of standing still.

Only if pay services are allowed to compete freely with each other in the open marketplace will the best and most efficient means of satisfying the American public emerge. Thus, the pay television industry as a whole suffers if unnecessary shackles are placed on any component of what is in many respects a single market for pay services.

As an example, years ago all three networks were the leaders of vigorous opposition to the development of pay television and predicted that it would seriously impact their own ability to serve the public. Today, as the marketplace has made its own determination in favor of pay TV, the networks have not suffered and, in fact, each has formed its own pay television division to take part in this exciting new area.

Further, on the purely technical side, improvements in one area may be of value in others. For example, the advances which Oak has pioneered in addressable STV technology are now also available to and used by cable television. Government regulation which inhibits the development of any of the new media can discourage investment in the research and development which is necessary to keep the American communications industry as a whole the finest in the world.

For these reasons, I believe that unnecessarily burdensome regulation of any phase of communications is beneficial neither to competition in the domestic video marketplace nor to American communications industry as a whole. I believe that S. 2172 is a step in the right direction. For the first time, Congress would articulate a national policy in favor of the expansion and development of cable communication. For too many years, the growth of new types of communication was retarded by regulation which treated the newcomers as unwanted stepchildren opposed to more established services. The declaration of purpose in the bill is necessary to prevent protection of the older, established technologies from competition from energetic newcomers.

Cable itself has also suffered from its exposure to two levels of government regulation, more recently from very unnecessary municipal regulation and franchising demands. In my judgment, the bill goes a long way toward rectifying the situation by clearly spelling out the areas of federal as opposed to state and local responsibility and by eliminating the dangers of overregulation at all levels, particularly with respect to state and local requirements.

In summary, any efforts to end the unnecessary and conflicting restrictions under which new technologies are forced to operate will further the health of the American communications industry as a whole.

This concludes my prepared statement.

I would be glad to respond to any questions you may have.

Senator **Goldwater**. Thank you very much.

Our next witness will be Mr. Don Franco, president of Microband.

Mr. **Franco**. Thank you, Mr. Chairman.

One of the primary goals of the telecommuncations policy of the United States is to provide the American public with the widest diversity of programing possible.

With the emergence of the domestic communications satellite, we have seen the number of program sources multiply to a point undreamed of only a few years ago, and much more is in the offing.

This development has been in response to the demand for all forms of pay television services. Yet, in spite of this, the vast majority of Americans who want these new services, particularly those in urban markets, remain unable to obtain them.

My company, Microband Corp. of America, has recently put forth a proposal to the Federal Communications Commission which we think will help satisfy this demand and at the same time provide a safeguard against existing and potential monopoly tendencies of the cable industry.

I would like to spend a few minutes describing that proposal.

Based on a recent Gallup organization poll, we estimate that there are as many as 46 million TV households today which want pay TV but which are unable to obtain it. By 1990 this unmet demand will still exceed at least 23 million households. This is a substantial portion of the American public.

Cable TV, the dominant provider of pay TV services, must be held primarily responsible for this state of affairs. Other existing services, such as MDS, STV and LPTV, have not and will not be able to fill this void primarily because of their limited channel capacity as compared with cable. This is so because a significant aspect of the demand for pay TV is that it is for multiple channels.

Since there are no alternative distribution systems authorized to provide multichannel broadband service, cable has been able to behave as a monopoly industry building at a schedule suited to its own pace with little incentive to upgrade antiquated systems.

In the words of the House Subcommittee on Telecommunications,

> The clear conclusion to be drawn * * * is that the proliferation of information and entertainment alternatives has yet to arrive for most Americans.

Furthermore, market projections indicate that the fully wired Nation will not occur in this decade. One forecast anticipates that there will continue to be as many as 30 million homes unwired for cable in 1990.

Cable's expansion into major urban markets has been especially slow. In fact, vast urban pockets are presently denied the benefits of any multichannel broadband service. In the Nation's 50 largest markets, only about 9 million homes out of 53 million, or 17 percent, have been cabled.

Two aspects of cable service have in the past created disincentives to cable's rapid expansion. First, its technology subjects cable to increasingly demanding local regulatory jurisdiction and long construction delays. Second, the capital intensive nature of business necessitates local monopoly control over facilities and the development of carefully selected service areas. These same economics, moreover, are responsible for the accelerating trend toward consolidation of ownership and increased horizontal and vertical integration.

This tendency has in fact existed for almost as long as there has been a cable industry. Attempts by other entities to obtain access to cable systems have been generally resisted by cable operators.

As a result, there have been calls to regulate cable in whole or in part as a common carrier, and these attempts have been uniformly opposed by the cable industry. To date cable has successfully warded off common carrier status and in the process has accumulated vast and unprecedented power.

With control over both the means of distribution and the creation of programing, cable is unique in its ability and power to influence public views and exclude competition. Indeed, as cable begins to provide the enhanced home consumer communications services presently being promised in the franchising process, it is likely that this issue will resurface as cable operators expand vertically to provide these services.

S. 2172 seeks to remedy this situation by mandating the provision of leased channels under some circumstances. While we applaud the sentiments expressed in the bill, we doubt that any legislation of this sort can be truly effective.

Rather than seek solutions to these acknowledged problems through added regulation of cable, Microband believes that the public interest is best served by a fully competitive marketplace which will insure downward pressure on the price to the public of premium television services; in other words, free market competition between alternative distribution systems. However, only if these alternative delivery systems have sufficient channel capacity to serve the needs of the marketplace can competition come about.

Microband has recently proposed that the FCC create nationwide wireless cable networks, an unwired nation, if you will, which will provide this necessary competition.

We have concluded that with multiple channels, MDS can provide a viable competitive alternative to cable and, at the same time, serve those urban pockets which cable has and will continue to avoid. It will also provide a competitive spur to cable, thereby moderating its monopoly characteristics and speeding its growth.

What we have proposed is the expansion of the capacity of existing, single channel MDS systems in the top 50 markets to 5 channels and the authorization of a third carrier in these markets.

The three multichannel carriers will use a limited number of presently unused microwave channels to create what are, in effect, over-the-air wireless cable systems. Because MDS is a common carrier service, the facilities provided does not control the programing. Rather, air time is sold on a first-come, first-served basis. Thus, the common carrier status of MDS guarantees access to its facilities for a wide variety of programing by a wide variety of programers.

In conclusion, let me say that MDS will not replace cable. MDS and cable will exist side by side. An optimistic projection of multichannel MDS shows that by 1990 MDS will be serving only about 6 million homes out of 100 million TV households. But if, by virtue of its presence, MDS shall have fostered lower prices in the marketplace, greater diversity of programs, a separation between content and conduit and increased cable profitability, the unwired Nation will have been in the public interest.

I thank you.

[The statement follows:]

STATEMENT OF DON FRANCO, PRESIDENT AND CO-CHIEF EXECUTIVE OFFICER, MICROBAND CORP. OF AMERICA

One of the primary goals of the telecommunications policy of the United States is to provide the American public with the widest diversity of programing possible.

With the emergence of the domestic communications satellite, we have seen the number of program sources multiplying to a point undreamed of only a few years ago. And much more is in the offing.

This development has been in response to the demand for all forms of Pay Television services. Yet, in spite of this, the vast majority of Americans who want these new services—particularly those in urban markets—remain unable to obtain them.

My company, Microband Corporation of America, has recently put forth a proposal to the Federal Communications Commission which, we think, will help satisfy this demand and, at the same time, provide a safeguard against existing and potential monopoly tendencies of the cable industry. I would like to spend a few minutes describing that proposal.

A. THE UNMET DEMAND

There are presently about 13,000,000 Pay TV Subscribers in the United States and this number is expected to increase by about 50 percent during the next year. While it is too early to determine the exact percentage of television households which will ultimately subscribe, a recent Gallup Organization poll indicated that fully 73 percent of those living in communities where Pay TV is available are interested.[1]

Although there is little available data dealing with future demand, projecting this 73 percent over the nation as a whole would lead one to conclude that today there could be as many as 59,000,000 potential Subscribers in the United States. This potential could increase to 73,000,000 by 1990 when total television households reach 100,000,000.

With 13,000,000 Pay TV Subscribers today, unmet demand approaches 46,000,000 households. If we assume that Pay TV subscriptions increase to 50,000,000 by 1990, or more than the number projected by most analysts, unmet demand would approach 23,000,000 households—a substantial portion of the American public.

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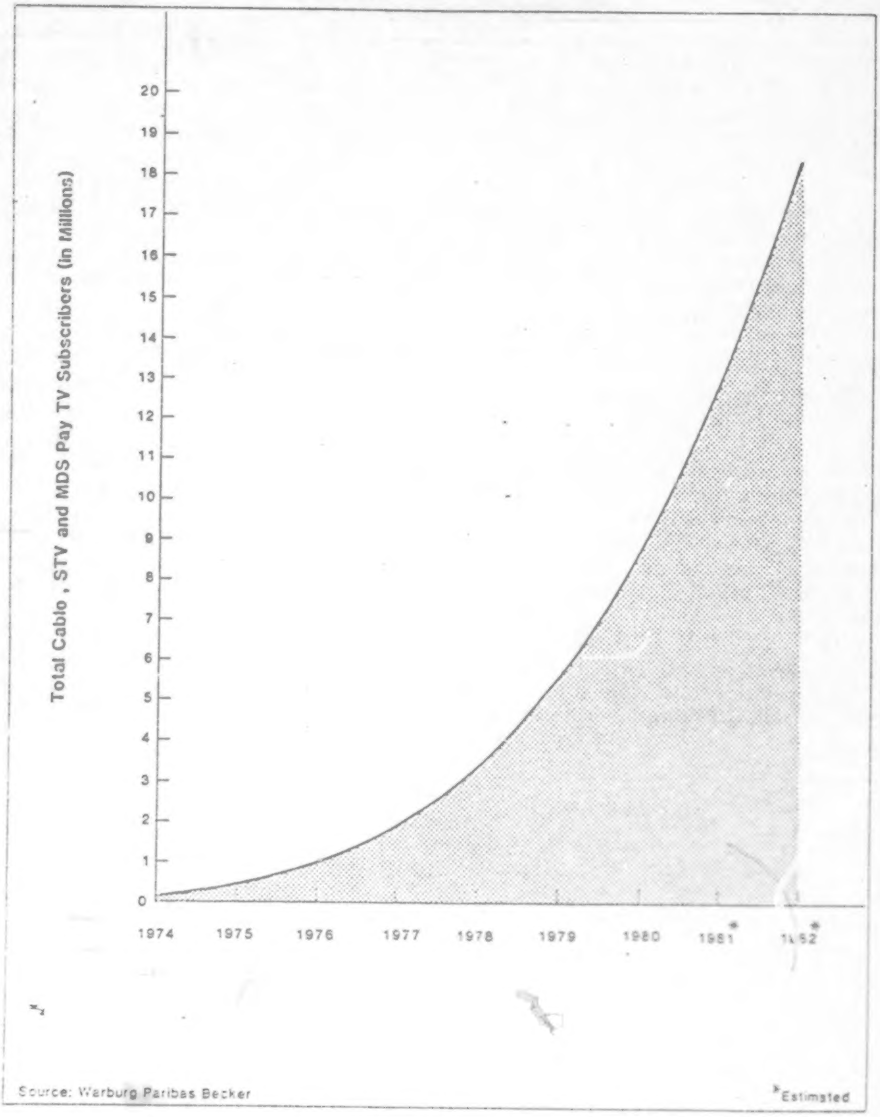
[1] "Gallup Study Shows Strong Interest in Pay TV," The Pay TV Newsletter, October 19, 1981, at 3.

Overall Pay TV Penetration



Source: Warburg Paribas Becker

*Estimated

Cable TV, the dominant provider of Pay TV services, must be held primarily responsible for this state of affairs. Other existing services, such as MDS, STV and LPTV, have not and will not be able to fill this void primarily because of their limited channel capacity as compared with cable. This is so because a significant aspect of the demand for Pay TV is that it is for multiple channels.[2]

Since there are not alternative distribution systems authorized to provide multichannel broadband service,[3] cable has been able to behave as a monopoly industry,[4] building on a schedule suited to its own pace, with little incentive to upgrade antiquated systems.[5]

In 1971, the Sloan Commission forecast that between 40–60 percent of all homes wold be cabled by 1980 and that "in metropolitan areas penetration is likely to be substantially higher".[6] In the ten years since this report was written, the foregoing has not occurred. It is estimated that only approximately 22,000,000, or roughly 27 percent of the 81,000,000 television households in the United States are currenlty cabled.[7]

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[2] A nationwide poll taken by the Gallup Organization in 1981 found that over 50 percent of all households in the United States desire more than one channel of Pay TV in addition to basic service. "Gallup Study Shows Strong Interest In Pay TV," Id., at 3. Actual experience confirms these research findings. In "new-build" cable systems which offer multiple Pay channels as part of their initial offerings, the average Subscriber purchases 1.5 to 2 Pay channels in addition to basic service. Looking into the future, this ratio is likely to increase as new services begin to be offered. Actual demand for these new services is less easy to determine because empirical data is limited at this time due to the newness of the technology. However, we anticipate market demand for interactive data services for both home and business to be substantial. The Yankee Group has forecast a $10 billion market by 1990 for interactive videotext services controlled by telephone keypads or activated by voice. See Communications News, September, 1981, at 92.

[3] With respect to alternative services, DEMS offers wideband but not broadband services and is targeted to business data markets. See, Notice of Inquiry and Proposed Rulemaking, FCC 79-464, 44 FR 51257 (August 29, 1979). DBS is at least 5 years away from implementation and applicants are proposing only three channels. See, A. Pearce, "Is There a Future for Direct Broadcast Satelliting?," Telematics, July 1981, at 26. STV and LPTV do not have multichannel capability and LPTV remains mired in a procedural log jam. See, An Inquiry Into the Future Role of Low Power Television, et al, BC Docket No. 78253, 82 FCC 2d 47 (1980).

[4] Competition among cable systems is virtually non-existent today as it has been since the inception of the cable industry. The F.C.C.'s Network Inquiry Special Staff's First Report on Prospects for Additional Networks (January 1980) states, "The economics of cable television usually prohibits 'overwiring,' and virtually all cable franchises accordingly are either de facto de jure exclusive." Two books were referenced by the staff in making this statement: Cable Television and the Problem of Local Monopoly, by R. Posner, and Cable Television: The Process of Franchising, by L. Johnson and M. Botein. By "the economics of cable" the staff means the high up front construction costs and the substantial penetration percentages (the industry average is around 50 percent of homes passed) required to recoup this investment. In theory, this makes it unlikely that many traditional cable companies will ever compete with one another for the same Subscriber, even though most franchises are "non-exclusive". This is so because two systems, each with 25 percent penetration, would not be economically viable. The facts support this. The July, 1980 issue of Paul Kagan's Cable Television Regulation newsletter, stated:

> Out of the 10,000 municipalities served by cable, only five are significantly or completely overbuilt. Two additional markets are under construction and a half dozen are in various stages of being granted.
>
> Historically, there have been approximately two dozen cases of overlapping franchises. *In most cases one of the companies has merged with the other or sold out.* [Emphasis supplied.]

[5] Notwithstanding all of the publicity surrounding 100 channel cable systems, fully three fourths of all cable systems today have 12 channels or less. The average system provides only 10 operating channels. Faced with little or no competitive incentive, most of these systems are not being upgraded. "Telecommunications in Transition: The Status of Competition in the Telecommunications Industry," A Report by the Majority Staff of the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, House of Representatives, 97th Congress, 1st Session (November 3, 1981), at 296 (hereinafter "Majority Staff Report").

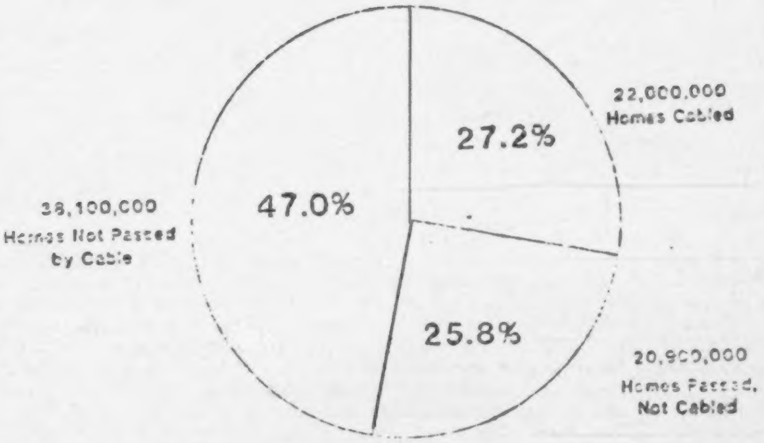
[6] "On the Cable, The Television of Abundance," Report of the Sloan Commission on Cable Communications, McGraw-Hill Book Company (1971), at 38–39.

[7] Home Video Report, September 21, 1981, at 3.

Cable Television Penetration

All Markets: September 1981

Total TV Households: 81,000,000



In the words of the House Subcommittee on Telecommunications, "The clear conclusion to be drawn . . . is that the proliferation of information and entertainment alternatives has yet to arrive for most Americans." [8] Clearly, the delivery of broadband services to consumers on a scale which the proponents of cable have characterized as "the wired nation" has not yet occurred, notwithstanding the substantial demand for Pay TV.

Furthermore, market projections indicate that a fully wired nation will not occur in this decade. One forecast anticipates that there will continue to be as many as 30,000,000 homes unpassed by Cable in 1990.[9]

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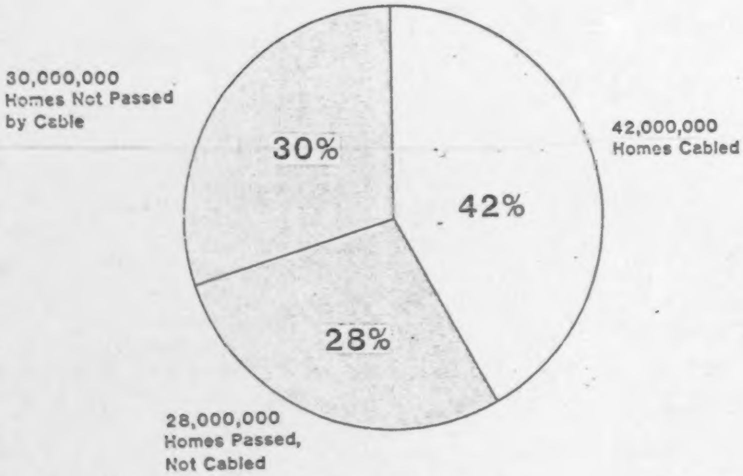
[8] Majority Staff Report, Id., at 357.

[9] The Yankee group has estimated that in 1990 fully 30 percent of all homes will not yet be passed by coaxial cable. Communications News, September, 1981, at 92. This means that there could be as many as 58,000,000 uncabled homes in the Nation in 1990, assuming that the current cable industry penetration rate of approximately 50 percent of homes passed is maintained. This assumption is thought by some, including the FCC, to be high when applied to urban areas.

Projected Cable Penetration

All Markets: 1990

Total TV Households: 100,000,000



Source: Yankee Group

Cable's expansion into major urban markets has been especially slow. In fact, vast "urban pockets" are presently denied the benefits of any multi-channel broadband service. In the nation's 50 largest markets, only 9,076,000 homes out of 52,981,000 (17 percent) have been cabled.[10]

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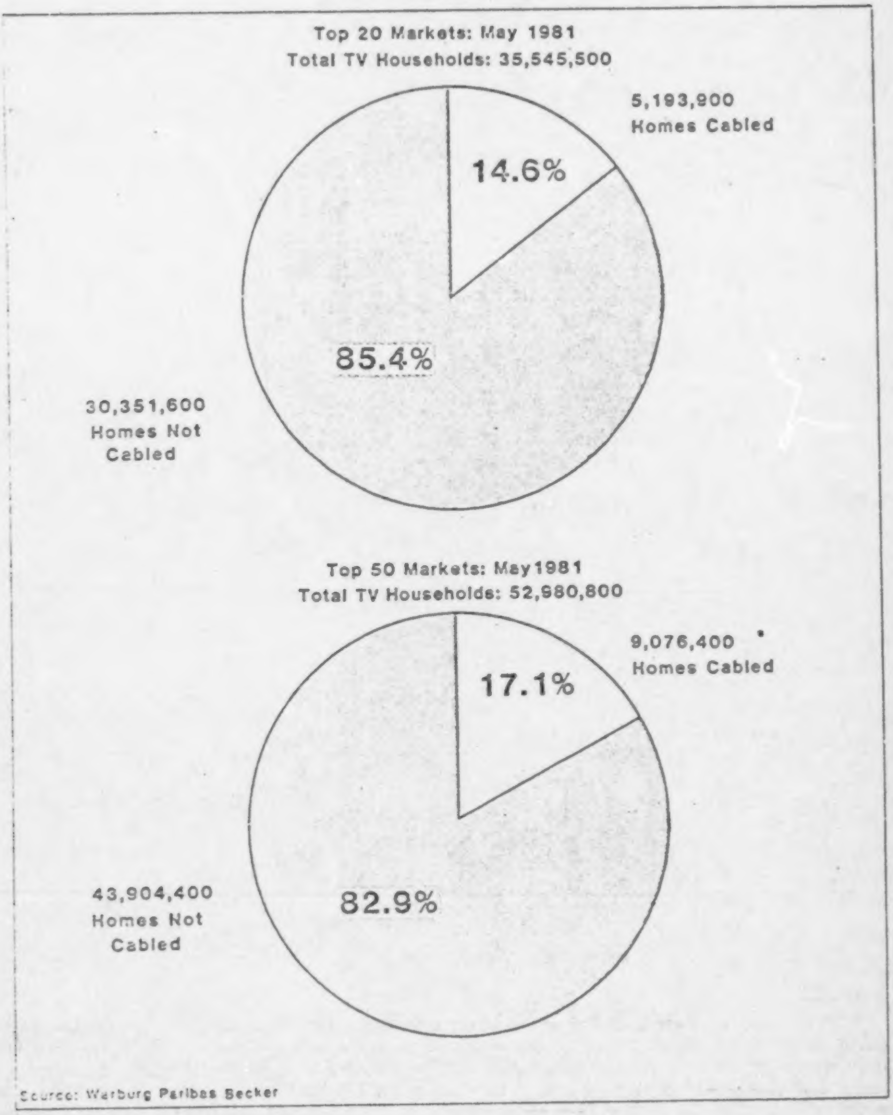
[10] "Five Year Performance Survey of the Cable Industry," Warburg Paribas Becker Incorporated, December 1981, at 4 (hereinafter referred to as the "Five Year Survey"). The situation is even worse in the very largest communities. The House Subcommittee on Telecommunications has found that cable penetration as a percentage of TV homes is smallest in counties located within 25 miles of the largest U.S. standard metropolitan statistical areas. In these counties (in which about 40 percent of all television households can be found) only 13 percent of the homes are cabled today. This compares with 29 percent for all counties of at least 150,000 populations outside the top 25 markets, which counties account for 30 percent of all television households. Smaller areas have even greater penetration. Majority Staff Report, Id., at 348. The subcommittee summarized these findings as follows:

Although radio and television outlets generally tend to increase as the size of the market grows * * *, the percentage of households opting for cable service is much higher in the smallest markets, accounting for the bottom 30 percent of all TV households. Cable service, of course, was first available in smaller outlying, often rural, areas, and then began to penetrate the suburbs. As of today, however, there is still cable penetration of only 14 percent in the Nation's top 10 markets, with only one of the top 10 markets, San Francisco, having cable penetration which exceeds 25 percent. Id., at 349.

* * * [I]t is apparent from the data available that only 9 of the top 50 markets have cable penetration exceeding 30 percent, and only 16 of the top 50 markets have passby figures which exceed 30 percent. In many major markets cable availability is much smaller than that. In Chicago, Detroit, Washington, and Dallas-Fort Worth, the Nation's 3rd, 7th, and 10th largest markets respectively, cable is available to only 6, 4, 8 and 1, percent of the homes. Id., at 350.

Urban Cable Penetration



Top 20 Markets: May 1981
Total TV Households: 35,545,500

Top 50 Markets: May1981
Total TV Households: 52,980,800

Source: Warburg Paribas Becker

B. THE CABLE MONOPOLY

Two aspects of cable service have, in the past, created disincentives to cable's rapid expansion. First, its technology subjects cable to increasingly demanding local regulatory jurisdiction and long construction delays.[11] Second, the capital intensive nature of the business necessitates local monopoly control over facilities and the development of carefully selected service areas. These same economics, moreover, are responsible for the accelerating trend towards consolidation of ownership[12] and increased horizontal[13] and vertical[14] integration.

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[11] See, e.g., Merrill Brown, "Cable TV Industry Says Local Demands Stifling," The Washington Post, January 3, 1982, at D-1.

[12] The House Subcommittee on Telecommunications commented on this trend thusly:

> The cable industry in becoming increasingly dominated by large multiple system operators (MSO's) * * *.
>
> Considerable merger activity has marked the cable industry * * * [O]f the largest 25 cable system operators in 1976, 11 had been bought or were the subject of pending mergers as of February, 1981, including five of the companies that were among the 10 largest cable companies. Teleprompter for instance, the second largest MSO (owner of over 1,000 cable systems today), accomplished its growth in large part through mergers before it was itself purchased by Westinghouse. Majority Staff Report, Id., at 194.

The result of these consolidations is described by the Majority Staff Report. At the present time,

> Over 80 percent of all households within franchised areas in which cable systems are operating are served by one of the 25 largest cable companies. Id., at 294.

Much of this has, no doubt, been casued by the extraordinary amounts of investment capital required to build the franchises which cable companies are now vying for in the Nation's largest cities. If one considers the total capital requirements of cable companies in the years ahead, increased consolidation can be expected. But other factors are also involved: (a) High interest rates have prevented companies from financing their own expansion, (b) a depressed stock market has prevented most companies from raising public equity funds, (c) it has been advantageous in the context of franchising to have a large, well-known parent, (d) fears that private market values have peaked have caused some smaller entrepreneurs to sell before maturity, and (e) the prospect of having to upgrade and expand the capacity of existing cable systems has frightened off others. Five Year Survey, Id., at 10-11

[13] The MSO's are increasingly controlled by companies with other large media interests, such as Time, Westinghouse, Warner, Cox, Storer and Times-Mirror. The Majority Staff Report found that:

> There is extensive common ownership of cable systems with other forms of information media. * * * 33 percent of cable systems are owned by broadcast companies, 18 percent by video program producers and distributors; 13 percent by newspapers; and, 11 percent of all cable systems are owned by other print publishing companies.
>
> The FCC has promulgated several rules dealing with cable ownership, but all deal with local cross-ownership, and do not address national ownership concentration in any way, except that the three major braodcast networks are precluded from owning cable systems.
>
> Although in 1968 the Commission proposed an ownership limit of 50 cable systems, it has never implemented such a rule * * *. Id., at 294-295.

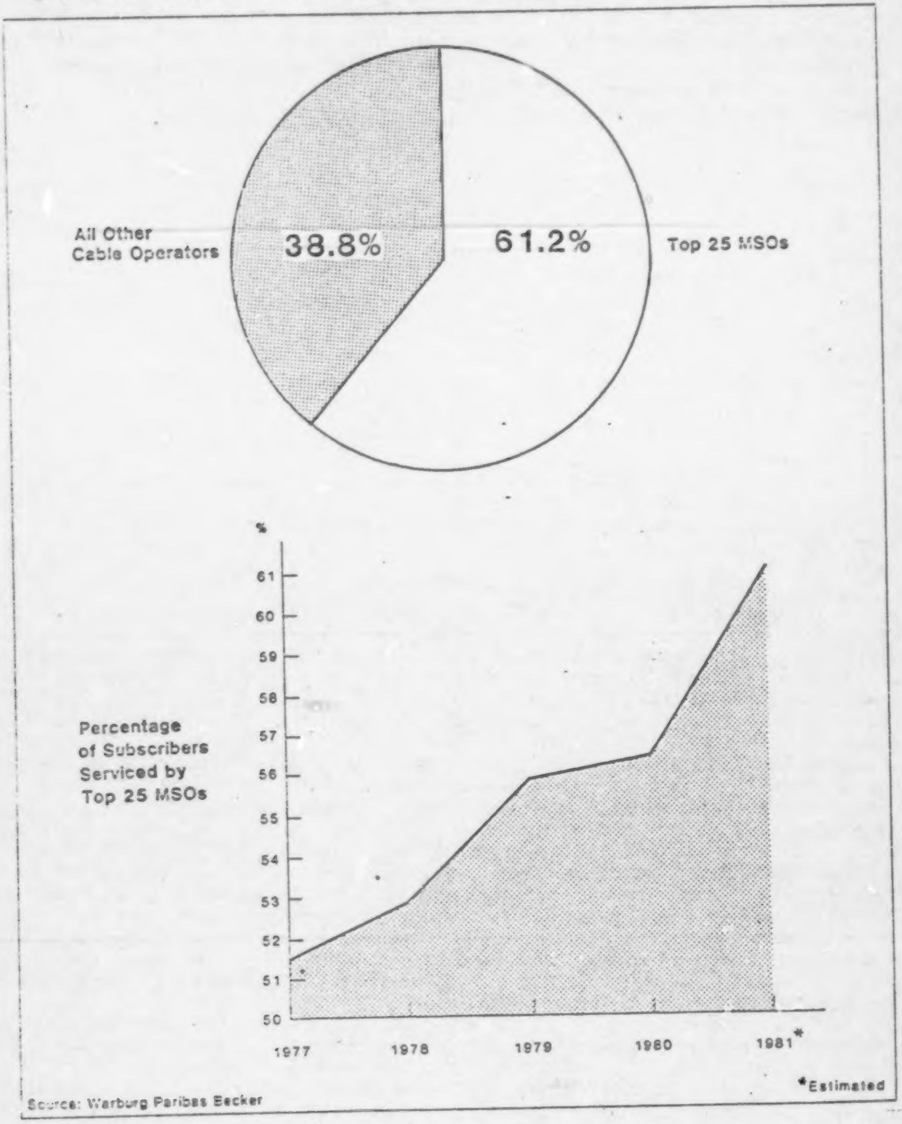
[14] Control over programing has begun to be concentrated in the large MSO's. The Majority Staff Reort noted that:

> There are also no restrictions on the vertical integration of programing and distribution, that is, on the ownership of pay-cable distribution services by MSO's. Thus, many of the major system owners and operators are also the leading cable program suppliers, including Time, Warner-Amex, Viacom, Teleprompter and UA-Columbia Cablevision. This scenario differs dramatically from the one which exists within the commercial braodcast realm, where networks are limited to five VHF outlets. In the absence of similar regulation, MSO's can play the role the networks have been barred from—controlling both content and local distribution facilities, or conduits, on a national scale.

Id., at 295.

See also, "The Cable TV Scramble—Large Corporations Charging Monthly Fees Pack Weight in Programing Competition", New York Times, December 23, 1981, at C-8.

Concentration of Cable Subscribers in Top 25 MSOs



*Estimated

Source: Warburg Paribas Becker

This tendency has, in fact, existed for almost as long as there has been a cable industry. While CATV initially developed as a service which exclusively retransmitted weak broadcast television signals, it was not long before CATV operators realized that economic benefits could be derived by supplementing those broadcast signals with locally-originated programs. Attempts by other entities to obtain access to cable systems for the same purpose, however, were generally resisted by cable operators,[15] notwithstanding the FCC's Rules which required that leased channels should be made available.[16]

As a result, there have been calls to regulate cable in whole or in part as a common carrier.[17] These attempts have been uniformly opposed by the cable industry.[18] To date cable has successfully warded off common carrier status and, in the process, has accumulated vast and unprecedented power. With control over both the means of distribution and the creation of programming (the conduit and the content), cable is unique in its ability and power to influence public views and exclude competition. Indeed, as cable begins to provide the enhanced home consumer communications services presently being promised in the franchising process, it is likely that this issue will resurface as cable operators expand vertically to provide these services.[19]

Rather than seek solutions to these acknowledged problems through added regulation of cable, Microband believes that the public interest is best served by a fully competitive marketplace which will ensure downward pressure on the price to the public of premium television services—in other words, free market competition between alternative distribution systems. However, only if these alternative delivery systems have sufficient channel capacity to serve the needs of a consumer market ravenous for multiple viewing options can competition come about.

MDS AND THE UNWIRED NATION

Microband has recently proposed that the FCC create nationwide "wireless cable" networks—an unwired nation, if you will—which can provide this necesary competition.

After a thorough market and financial investigation, Microband has concluded that, with multiple channels, MDS can provide a viable competitive alternative to cable and, at the same time, serve those urban pockets which cable has and will continue to avoid. It will also provide a competitive spur to cable, thereby moderating its monopoly characteristics and speeding its growth.

What Microband has proposed is the expansion of the capacity of existing, single channel MDS systems in the top 50 markets to five channels and the authorization of a third Carrier in the same markets.

The three multichannel MDS Carriers will use a limited number of presently unused microwave channels to create what are, in effect, over-the-air "wireless cable" systems.

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[15] See, e.g., TM Communications Co., Docket 20970, FCC 77m-1031, granting consent order vacating order to show cause and terminating proceeding (June 7, 1977). Cable operators are now asserting the right to be broadcasters or "tele-publishers" on all of their channels. See, report of National Cable Television Association to Senator Packwood, "Cable Television, Government Regulations and the First Amendment," April 1981 (hereinafter "The Packwood Report").

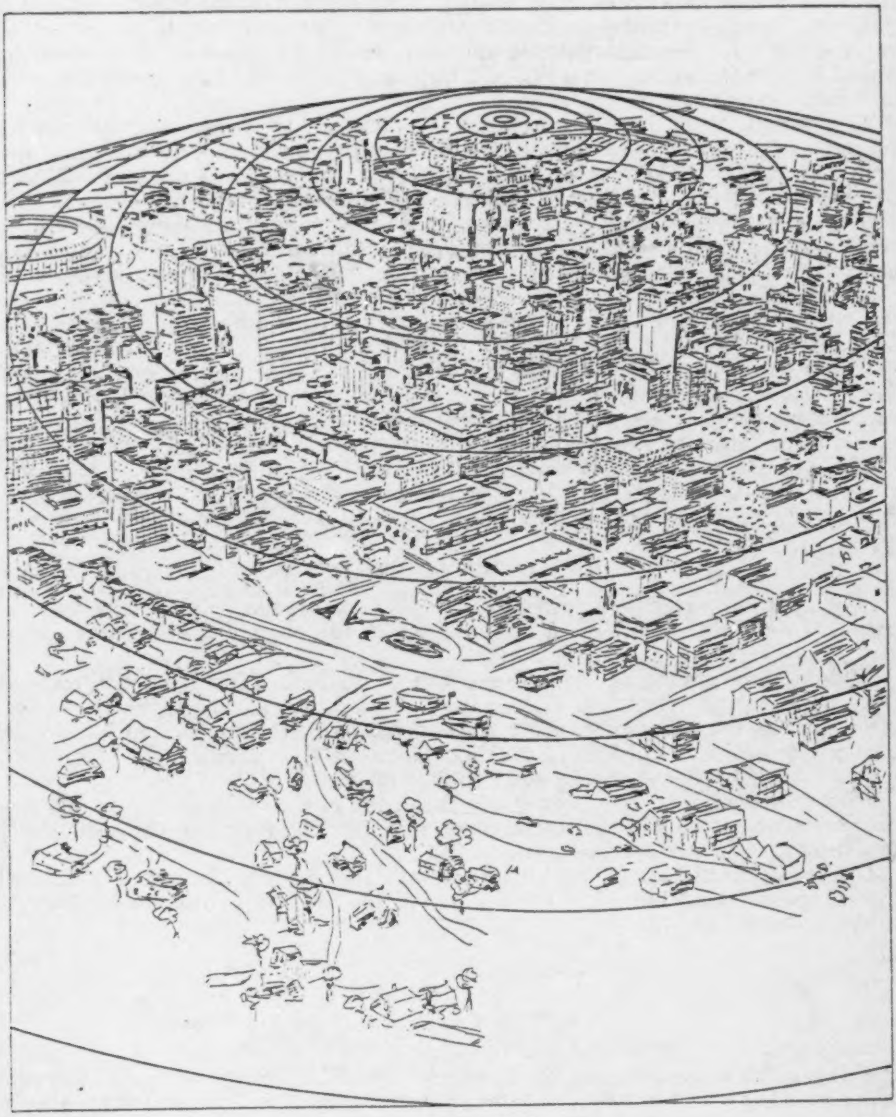
[16] See former section 76.254(a)(4) of the FCC's rules.

[17] See, Report to the President of the Cabinet Committee on Cable Communications, Washington, D.C., January 1974. See also, In the Matter of Cable Leased Channel Access on New, Large Capacity Systems, petition of Henry Geller and Ira Barron to issue notice of proposed rulemaking, RM 3999 (filed October 9, 1981).

[18] See, "Leased Access: Common Carrier Promotion?" Multichannel News, December 21, 1981, at 37; The Packwood Report, footnote 15, supra.

[19] For example, faced with the prospect that Westinghouse or its subsidiary, Teleprompter, might not be able to provide a home security system on its cable system due to a previous contractual agreement, president Daniel Ritchey of Westinghouse stated that such a decision: "* * * would be a major disaster for us * * *. First we would be in breach of any franchise agreements which one way or another require that we provide it, and second, it would be impractical for us to compete for new franchise business because it has become a standard thing across the country to require it * * *. Even though at this moment it's of no consequence to us in terms of revenue, I think it would essentially make it impossible for us to continue in the cable business over time * * *." Communications Daily, October 26, 1981, at 2.

An Over-the-Air "Wireless Cable" System



MDS is a low power, omnidirectional common carrier transmission medium which has been operational since 1973. It's signal covers a radius of 20-25 miles from its central transmission site. Generally, MDS stations are fed by satellite and transmit signals to private homes, multiple dwelling units and hotels. At each reception point, the MDS signal is received by low cost receiving antennas mounted on the rooftop and downconverted to an unused VHF television channel for viewing on the Subscriber's conventional television set.

Because MDS is a common carrier service, the facilities provider, the FCC licensee, does not control the programming. Rather, airtime is sold on a first-come, first-served basis. Thus, the common carrier status of MDS guarantees access to its facilities for a wide variety of programming by a wide variety of programmers.

Microband envisions that two-way asymmetrical as well as duplex interactive data services (similar to those proposed by many cable operators)[20] will be offered by incorporating existing intelligent packet network facilities, such as those provided by Microband's sister company, Tymnet, into the MDS system. Local nodes, equipped with information storage modules, voice response units and other "intelligent" software and hardware, will enable customers to offer many innovative services such as (a) entertainment services (movies, sports, etc.). (b) information services (videotext, electronic mail, etc.). (c) transactional services (electronic funds transfer, electronic games, shop at home, etc.), and (d) general enhanced services (security, energy management, teleconferencing, etc.).

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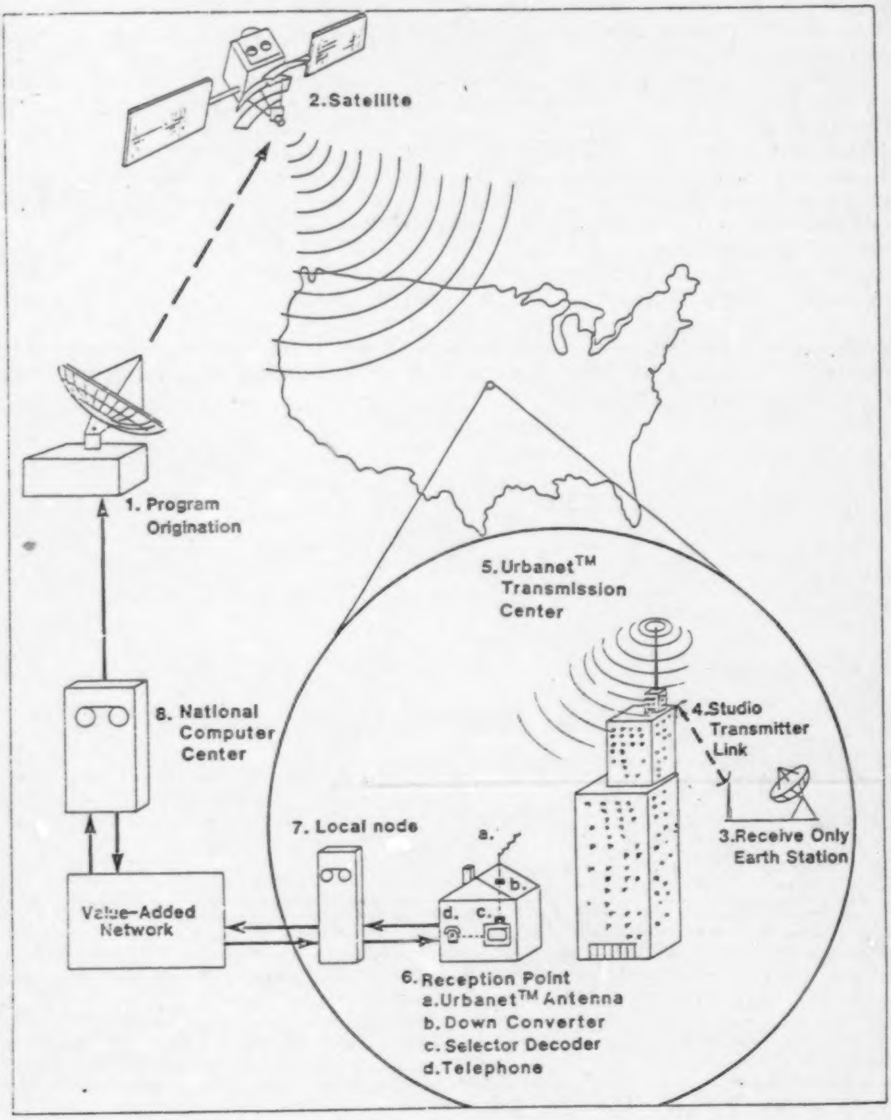
[20] A general review of comments of cable executives reveals a strong interest in interactive services. See, "Wire—A Cable Fable", Cablevision, December 15, 1980, at 72. However, the major expense required to implement two-way interactive services on existing and planned cable systems may not be competitive with alternate methods of interaction, or justified by consumer interest. See, "Don't Oversell, Cable Industry is Cautioned," Broadcasting, August 31, 1981, at 29; Silverstein, "The Revenue Potential of Interactive Data," i.f. Magazine, Autumn 1981 at 18; Metz, "Storer's Plans Questioned", New York Times, October 26, 1981, at D-6. The expense of converting the vast majority of the cable systems—the traditional 12 channel systems—to two-way interactive service is very high. Furthermore, the benefits from building two-way capability into new systems, when an alternative return path, the telephone, is already present in virtually every cabled home, is open to question. See, "Phone-Cable Hybrids Seen," New York Times, November 5, 1981, at D-2; "Broadcast/Phone 'Hybrid' Seen as Two-Way Cable Challenger," Communications News, September 1981, at 92. Indeed, A.T. & T. and CBS, among others who are experimenting with interactive videotext systems, have focused on the existing telephone system as the most cost-effective return path. See, "A.T. & T. Sharpens Focus of U.S. Videotex Plans", Computerworld, October 12, 1981, at 9; "Report Says A.T. & T. May Be Best Medium for Electronic Publishing," Multichannel News, October 12, 1981, at 24.

For some time now, the cable industry has exploited the promise of interactive services in their franchise applications. The Qube technology, developed at great cost by Warner-Amex Communications, has achieved a great deal of publicity in recent years, as have other proposals by other cable interests. The promises, however, have not been realized.

As the Wall Street Journal stated recently in a feature article on Qube, "Born nearly 4 years ago with lots of hoopla, Qube and its 'interactive' capability were supposed to transform [the] lifestyle in Columbus [Ohio]. 'The age of passive viewing is over' Qube declared in its promotional literature * * * ' because the miracle of Qube is here." The main miracle of Qube, however, has been its role in helping Warner Amex win a major share of cable franchises."

See, "Two-Way Cable TV Disappoints Viewers in Columbus, Ohio, as Programing Lags," The Wall Street Journal, September 30, 1981, at 31.

The Urbanet™ System


2.Satellite
1. Program Origination
5.Urbanet™ Transmission Center
4.Studio Transmitter Link
3.Receive Only Earth Station
8. National Computer Center
7. Local node
a.
b.
c.
d.
Value-Added Network
6.Reception Point
a.Urbanet™ Antenna
b.Down Converter
c.Selector Decoder
d.Telephone

Because our proposal involves no new technology—merely the expansion of existing MDS transmission facilities and their use in conjunction with in-place telephone-based data communications facilities—and because MDS facilities can be expanded much more rapidly than cable can be installed, construction in all of the top 50 markets could be completed within 24 months of the first grant, within 6 months thereof in many cases. Total construction cost is not expected to exceed $35,000,000 for all carriers in these markets, as compared to many billions of dollars to construct cable systems in the same markets. As a result, MDS will be very competitive.

But this is not, insofar as cable is concerned, competition to be feared. Rather, it is competition which will improve the return on investment for the cable operator.

This is so because franchising authorities force the cable operator—because it is a monopoly—to build in all sections of the franchise area. These local officials, responding to pressure from their constituencies, are concerned more about providing universal service than about the cost or efficiency of that service. For example, Warner-Amex's franchise proposal to the City of New York for the Borough of Brooklyn included areas profitable as well as unprofitable for cable. This held their overall return on equity to a low 11.3 percent. On the other hand, if only the viable sections were built, Warner-Amex's return would be almost double.

Stated another way, if cable operators were not required to subsidize one part of the market with the fees charged in another part, they would be in a position to lower their price to the public. Assuming that these other areas would have MDS-delivered programming available (which they will within two years of Commission action), the concerns of the city fathers would be satisfied. Universal cable service will develop at a price far lower than would be possible if the entire area were cable.

Achieving an effective counter-balance to cable's monopoly status through marketplace factors would also eliminate the necessity for increased Commission and local regulation of the cable industry. As Tom Wheeler, President of the NCTA, said, "That [Microband's proposal for regulation by marketplace forces] is all the more reason for cable to be deregulated at the local level." Microband supports this point of view. But to achieve regulation by marketplace forces requires viable, alternative delivery systems which have sufficient channel capacity.

In conclusion, let me say that MDS will not replace cable. Rather, they will exist side by side. An optimistic projection of multichannel MDS shows that by 1990 MDS will be serving only 6,000,000 homes out of 100,000,000 TV households. But if, by virtue of its presence, MDS shall have fostered lower prices in the marketplace, greater diversity of programs, a separation between content and conduit and increased cable profitability, the unwired nation will have been in the public interest.

Senator GOLDWATER. Thank you very much, Mr. Franco.

Our next witness will be Mr. Marshall Carpenter, Jr., of Neighborhood Television Co.

Marsh, you may proceed.

Mr. CARPENTER. Thank you, and good afternoon, Senator Goldwater.

I am Marshall M. Carpenter, Jr., of Phoenix, Ariz., and I am president of Neighborhood TV Co., Inc., a company that was formed to establish a new nationwide broadcast television network with the financial support of Sears Roebuck's Allstate Insurance Co.'s Venture Capital Dept.

Rather than read my full remarks which I am submitting to the committee for inclusion in the record, I will only take a few minutes to summarize.

My company's desire to create greater program diversity may be similar to that of this committee in S. 2172, section 606(a)(2), in its efforts to assure outlets for those with TV programs for the public.

Our view of how to accomplish this greater program diversity matches the conclusion reached by the FCC's network task force study which is that only networks can create quality programs because of the audience base required to finance the cost of these programs. Using national networks as a foundation, local affiliated broadcasters can succeed and then become outlets for local programs as well.

Although the FCC has been declaring the need for more national networks, its own staff study group concluded that the Commission's actions over the years have not matched its rhetoric. The shortage of available TV facilities in most markets outside the top 50 and the high cost of interconnecting the stations have technically hobbled the formation of new networks.

But about 2 years ago it came to us that through the use of new technology and FCC roles that had been in place since early 1978 a new broadcast network could be formed and no one yet utilized these facts. Yes, through the use of satellite technology and by using old fashioned TV translators in major markets as opposed to the small towns where they had traditionally been used in the past to relay distant TV stations, we are able to transport the programs of a full service broadcast station, KUSK, located in Prescott, Ariz., via satellite and translator to TV antennas on homes in the major population centers of the country. Armed with the realization that we had found a way to get over the technological hurdles, we set out to create a new network featuring the positive attitudes and family values of small town and rural populations and focusing on what is good about America.

We obtained the support of Allstate Insurance Co. and started filing for translator stations in the major metropolitan markets. Then along came the FCC's low-power TV rulemaking where the FCC failed to follow its own rules by the unprecedented action of accepting applications prior to completing the rulemaking process and all of our heroic and promising plans are now on hold.

The net result of introducing a low-power TV service has been to elicit an avalanche of competing applications that will take years to unscramble, but, more importantly, we believe will result in creating a multitude of broadcast pay television operations that will have no requirement to provide programs relevant to the public needs.

Hence, under the current course of action by the FCC I do not believe that low-power TV is likely to become, as referred to in S. 2172, "a reasonably available alternative for persons desiring to provide programing service to the public."

Obviously, we feel that this is unfortunate, and also obviously, as you can understand, we feel that the public would be better served if a way could be found to free up neighborhood TV's attempt to start a new national broadcast network. Then would a meaningful alternative evolve on a local and national basis.

Thank you very much, Mr. Chairman.

[The statement follows:]

STATEMENT OF MARSHALL M. CARPENTER, JR., PRESIDENT, NEIGHBORHOOD TV CO.

I am Marshall M. Carpenter, Jr. of Phoenix, Arizona. And, I am president of Neighborhood TV Company, Inc. a company that was formed to establish a new, nationwide television network. Neighborhood TV is financially backed by Allstate Insurance Company's venture capital group.

The backbone of Neighborhood's network would be the interconnection of inexpensive UHF stations that would be built in the principal population centers of the nation. Our interest in forming a new broadcast TV network derives from the recognition of the need for greater program diversity.

These inexpensive UHF stations that we have in mind are an old and established service. You may be more familiar with this type of station by its formal name—"translator". It was conceived some thirty years ago as an inexpensive technique for extending TV service to remote areas or for filling in bad reception spots in the service areas of full-service stations. They are basically repeaters, in that they pick up the signal of an operating station and merely extend it out. They are called translators because they always pick up, let us say for example, a TV station on channel 4 but repeat—or send it out—on another channel, perhaps channel 30, that is not in use in the area and therefore will not interfere with existing signals. Thus, there is a translation—from channel 4 to channel 30, as in the example I just gave.

There are thousands of these translators in operation. Some are operated by full-service stations in order to extend their reach; others are operated by community groups wanting to bring TV service to remote areas. They offer limited coverage—a radius of perhaps 10 to 15 miles in all directions. They work as well in large cities as elsewhere. And the FCC's licensing policy has traditionally been hospitable and very lenient in giving the green light to those interested in installing these low-cost booster-type stations.

Keeping that kind of station in mind, let me switch gears for a moment. Serious critics of the telecommunications industry have for decades been decrying the lack of variety that characterizes the offerings of the three principal network suppliers of the television programming that all of us are basically locked into. And the FCC has, for its own part, also been wringing its hands and declaring how necessary it is to have more national networks in order to bring diversity to television. Periodically—about every decade or so it seems—the agency establishes a staff task force or study group to inquire into the problem. The most recent report of such a group was published in October, 1980.

Inevitably, and quite predictably, the reports of these groups reinforce the judgment that only more networks—not individual and unconnected stations spotted here and there—but only more networks can bring diversity. That is so because only a network with a sufficient audience base can finance the costs of quality programming by spreading these costs over a lot of affiliated stations and across a number of markets. Inevitably and predictably, too, the likelihood that a new broadcast nework might start up is always said to be slim because of the shortage of available facilities in most markets. Simply, in other words, because there is no fourth station in many of the TV markets below the top 50, there is no opportunity for another network to build up to 150–200 local afiliates in order to compete on a nationwide basis.

But the translator phenomenon, it will surely occur to this Committee as it did to us, does offer the prospect of meeting the shortage of available facilities. And even the plaguing costs of interconnecting these stations by traditional means such as wires or microwaves was resolved by the development in the late 1970's of statellite interconnection. That is, an originating signal could now be sent up to a satellite and distributed downward over the whole continent for inexpensive reception at each point of translator operation.

Out of that meld of circumstances was born the concept for a new and inexpensive nationwide TV network. And, so, Neighborhood TV Company filed, beginning on September 2, 1980, 141 applications for new translator stations to be installed in the major population centers of the country. It is proposed that the programming that will originate with new, full-service station KUSK-TV in Prescott, Arizona, will be repeated in all of the principal cities where these associated translator stations will be installed. The combination will, of course, constitute a new network, and it was expected that the Commission would applaud and nourish the effort.

The program content, it is proposed, will be a unique blend of music, actualities, comedy, attitudes, and folklore of rural and small-town America. Programming will reflect patriotic and historic events, old-fashioned values, the virtues of family living. Individual ideas include country music, rodeo, local little theatre, children's programming focused on growing up in rural America, classic American Western drama—Zane Grey, for example, how-to-do-it programming on hunting, fishing, camping, and other "western" interests, features on family living with emphasis on traditional American values—in short, a panorama of Americana. The possibilities are endless and the alternative quality of the programming abundantly evident.

The bill before you—S. 2172—proposes to legislate the "Cable Telecommunications Act of 1982." It would add a Title VI to the Communications Act and would provide in Section 606 for the dedication of channel capacity. Specifically, the FCC is directed to require all 20-or-more-channel cable systems to set aside 20 percent of their channels, 10 percent for use by public, educational, and governmental producers and the other 10 percent for use by leased channel programmers.

Paragraph (b) of Section 606 would, however, permit the FCC to relieve the set aside requirement for leased channels on a finding by the Commission that there are "reasonably available alternatives for persons desiring to provide programming service to the public in a particular geographic area or market." Neighborhood TV would, of course, if its network proposal were realized, be available as such an alternative outlet for program suppliers, at least in every market where we had a translator. Moreover, translator stations are now permitted to originate their own programs, a feature only recently made available. In addition, then, to being a new national customer for program product, Neighborhood's associated translator stations would be available on a local or regional basis. And, by virtue of the nature of translator facilities, the costs of this kind of access will be pegged at a scale much reduced from the rates customarily associated with using the facilities of a full-service station.

I just noted that Neighborhood TV would be an alternative outlet, if its network proposal were realized. But, under the present course being followed by the FCC, there is considerable doubt whether Neighborhood TV's plans will be realized, or whether any low power TV will provide alternative public program outlets in major population centers. It is my judgement that the way the FCC has blueprinted this phenomenon, low power TV will become not much more than a vehicle for more pay-television services.

What I have described for you is the plan and the potential of the heroic concept that Neighborhood TV launched almost two years ago with its first applications to the FCC in September, 1980. But, what has occurred is a burlesque of agency misadventure. And, so, what started out full of hope has languished without movement. Not a single one of Neighborhood's applications has been granted even though they were filed in strict accordance with the translator rules and despite assurances by the Commission's staff when the applications were being developed that they would be "routinely granted because they are translator applications".

But that is a story for another forum perhaps and I will not burden this Committee with the details of why the FCC has in effect permitted a freeze to close in on Neighborhood's proposal. I would with your permission, however, like to enter into the record at this point an extension of my remarks that will recite what happened on the way to competing against NBC, ABC, and CBS.

The fact that Neighborhood's plan for a new network is not being permitted to get off the ground will come as no surprise to the Commission's most recent Network Study Task Force that I alluded to earlier. It was their judgment that the FCC's own actions over the years have been inconsistent with the Commission's declared interest in new networks. You will find some of the details set out in the attached clipping from the New York Times. The precise language of the network study group (page 4 of its Report of October, 1980) is that: ". . . the Commission limited the ability of new networks to enter and sacrificed the potential improvement in network competition in order to achieve some other goals. In no case have these other goals been realized." With its latest treatment of Neighborhood TV's proposal for a new network, the Commission is proving how hard it is to break old habits. Simply, the Commission is doing it again—it is shuffling to a back burner a serious proposal for a new competitive nationwide network and hiding it behind the curtain of a proposed new television service, the goals and viability of which are dubious but which will eat up a decade before that gloomy estimate definitely proves out.

All of this is coming about because in the closing days of the last administration—specifically on September 9, 1980—there was announced a proposed new program to help racial and other minorities by letting them file for a kind of translator station that is dubbed "low power". The difference between the two—between a translator station and a low power station—is that the latter would not be tied to a regular full-service station, would be permitted to program without restriction, could even offer over-the-air pay television.

The announcement of the proposal was via the conventional rulemaking route that requires notice, comment, and deliberation. But, in a complete break with precedent and logic, the Commission announced that it would accept applications and would authorize the new stations on an interim basis, even though the institution of rulemaking on September 9, 1980 was in effect a posing of the question of whether the new service should be established.

In response to that curious invitation to file interim applications—and realistically it was an invitation to jump the gun in anticipation of the final result—some 5,000 to 7,000 applications have been filed. Worse, they were all given competitive status with the applications of Neighborhood TV and others who had applied for regular and translator stations in the established service.

It will help clarify it I note here that it is a firmly and long-established legal principle that when two or more applications are filed for the same station (i.e., the same channel in the same community), none of the applications may be granted without a comparative proceeding that most of the time goes on for years. Because the Commission conferred full competitive status on those low power applications that were filed before they could be made lawful by the establishment of the service after a proper rulemaking, Neighborhood's legitimate applications were in most cases thrown into comparative status with these premature filings. And all of these contests are now absolutely stalemated and in an indefinite deep freeze.

The whole nature of the notice and comment process in rulemaking has to do with assuring access by the public to an open-minded Commission that is not irrevocably wedded to a particular course of action in advance of the submissions by persons interested in the rulemaking. Any other view would make little logic, would reduce the rulemaking process to a ceremony or a rite for rubber-stamping preconceptions. And there is a considerable body of law having to do with disqualifying decision makers on findings of prejudgment. See *Association of National Advertisers* v. *FTC*, 627 F. 2d 1151 (1979) cert. denied 447 U.S. 921 (1980) and cases cited therein.

Expectably, because of the invitation to file in anticipation of the result, charges of prejudgment have been leveled in this low power proceeding from a broad spectrum of interests. In addition to Neighborhood TV's contention, the National Association of Broadcasters (NAB) and the American Broadcasting Companies (ABC) also offered objection. See Memorandum Opinion, 48 Pike & Fischer Radio Reg. 2d 1197, released January 16, 1981. Even the National Telecommunications and Information Administration (NTIA) suggested various alternatives to the Commission "to avoid the appearance of prejudgment." Id., at para. 22. In response to all of these, the Commission's public documents have become stridently defensive.

Simply, the self-serving plea of innocence is overwhelmed by the evidence at hand. First, the interim acceptance of applications prior to the actual establishment of service was a departure from unbroken precedent at the Commission. One need look no further than FCC Commissioner Washburn's unguarded remarks (copy of excerpt, underlining added, is submitted herewith) to the Texas Broadcasters Association on February 18, 1981 where he confessed that:

"With respect to the low-power television docket, I would emphasize that the Commission's action on September 9, 1980, was only a Notice of Proposed Rulemaking to establish a low power television service. At that time we also established interim guidelines to cover the handling of low power applications during the rulemaking proceeding. This was unusual. We usually do not process applications until we have a service in being, but under existing FCC rules, there is no such thing as low power television."

Next, the filing of some 5,000 to 7,000 applications is an overwhelming reading by those in the television industry who know that they regarded the low power service as a shoo-in. And, in fact, it did turn out to be a foregone conclusion—the Commission did establish the service on March 4 of this year.

Almost embarrassingly, it now appears likely that most FCC Commissioners went along with the proposal because it was assumed that there was no turning back. How else can the candid expressions, as recorded in the attached clipping from Multichannel News for April 12, 1982, be explained. Thus, a consensus of six Commissioners speaking on a panel at the recent NAB convention are said to doubt the "viability of low power TV". According to Commissioner Fogarty: "The only thing we have that's worse is CB radio". Commissioner Quello was of the view that: ". . . licensing problems will probably prevent low power from realizing its potential as an inexpensive media outlet for minorities. . . ." And so it went. Another observer—Broadcasting Magazine also for April 12, 1982 (copy attached herewith)—saw and heard the consensus the same way. In fact, according to Broadcasting: "The commissioner's (Fogarty's) responses to a question from NAB executive vice president and general manager John Summers, who moderated the panel, caused some in the audience to wonder how the order creating the new low-power television service was approved unanimously. . . ."

"How", indeed! A new low power service has been established that individual Commissioners seem dubious about. The law and precedent were stretched and broken in order to invite premature applications that were given the kind of competitive status that has held the Neighborhood TV network concept at bay. And all in the name of creating a service in the ostensible interest of minority participation.

But, Commissioner Dawson confessed last December 1 in a speech to the National Conference of Black Lawyers that: ". . . only 200 minority applications were filed for low-power television licenses out of the 5,000 applications that the Commission has already received." So, a new nationwide network of conventional translator stations as proposed by Neighborhood TV has been shelved because the Commission found it necessary to intrude a new low power TV service for the benefit of minority ownership. But, it turns out that minority applicants are not interested, according to Commissioner Dawson. Curiously, that didn't even cause the Commission to pause. It went right ahead to finalize the service on March 4.

Recall the reference earlier to the Commission's network study group and their outright assertion that the Commission had over the years: ". . . limited the ability of new networks to enter and sacrificed the potential improvement on network competition in order to achieve some other goals. In no case have these other goals been realized." To repeat: "In no case have these other goals been realized." The "other goal" in the low power distraction is the opening up of television ownership opportunities to minorities. But, minorities are not interested, according to Commissioner Dawson, who referred to low power in that same speech as these "dog" stations.

And so, the paraphrase: "In this case, too, the other goal will not be realized but the potential improvement in network competition will be restrained and limited."

The mystery of it all is why the Commission is going to all this trouble when the solution to all misgivings about the credibility of its program is so simple. All the Commission has to do to restore plausibility is to announce that all valid translator applications filed before the final March 4 adoption of the low power service will be processed without regard to the prematurely-filed low power applications. The Commission could then have its fourth network and, in the process, lose almost no benefit from its launching of the new low power service.

Why the FCC has refused to follow so appropriate, so legal, so reasonable and, yes, so natural a course is indeed baffling. The Commisssion hasn't suitably explained it to Neighborhood TV Company. Perhaps it would be willing to give an accounting to this Committee.

Senator GOLDWATER. Thank you, Marsh.

That is a very, very exiciting thing that you are engaged in, this new network.

John Raines will be our next witness. He is chairman of the National Satellite Cable Association.

Mr. RAINES. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, thank you for this opportunity to appear today.

The NSCA, or the National Satellite Cable Association is the trade association which represents Master Antenna TV Systems, MATV, and Satellite Master Antenna Television Systems called SMATV.

The SMATV satellite cable industry consists of individuals and small companies that install and operate fully functional cable systems in privately owned residential developments such as apartment houses, condominiums, and garden apartments typically without municipal franchise which are on private property and do not use public streets. We estimate that over 15 million homes receive their television from MATV systems.

NSCA believes that any legislation regarding the cable communications industry must have as its ultimate objective the presentation to the American public of the most diverse and greatest number of information sources possible.

The NSCA further believes that this objective should be and can be achieved by the continued adherence to two principles which are the bedrock of the American communications systems.

No. 1, reliance on the free enterprise system, wherever possible, and the long-term socioeconomic benefits which accrue from open and unfettered competition.

No. 2, noninvolvement of Government in the communications field, as embodied in the first amendment, except as necessary to promote the free and open exchange of information.

The right of the satellite industry to exist and operate has been recognized in law and in FCC policy, including operation in those areas which are subject to municipal franchise.

The satellite cable industry promotes diversity of information sources by bringing the benefits of cable to areas which by reason of geography, economics, or politics are not served by a municipally franchised cable operator. The SMATV cable industry also promotes and encourages diversity of information sources in areas subject to municipal franchise by offering a competing and alternative distribution system to residential and commercial developments.

Notwithstanding the sound legal basis and recognized social and economic benefits the SMATV cable industry brings, it has been subjected to harassment and anticompetitive tactics by its competitors who make use of the public streets and rights-of-way through grant of a municipal franchise. These competitors typically construe their limited franchise privilege as a monopoly of right and bring political and economic pressure to bear on the satellite cable operator through State and local agencies.

Many of the major satellite programing sources which are themselves wholly owned subsidiaries of cable conglomerates refuse to deal with the SMATV industry. These program sources openly admit such a refusal is due to pressure brought to bear on them by the so-called franchise cable operators.

The satellite cable industry does not seek any favors. This industry simply seeks the opportunity to compete openly, freely, and fairly in the communications marketplace. To that end, the NSCA respectfully requests that Congress examine:

First, the refusal of program suppliers to deal with the SMATV and satellite cable industry;

Second, the cable operators' use of the municipal franchise system to secure a monopoly on the Nation's wired distribution system; and

Third, State and local laws that promote and protect the interests of large, well-heeled cable conglomerates at the expense of small and independent private cable operators.

Unlike the municipally franchised cable system which has a license to use the streets, alleys, and rights-of-way of the community, the SMATV systems are built on private property to serve the residents in a private community. This type of cable service is an important part of the Nation's telecommunications system. It utilizes all the elements of modern technology and blends them together to serve a large, and the fastest growing, residential market. Without SMATV cable, we estimate that more than 10 percent of the population would wait longer than 10 years to receive a wired system and some areas would never be wired by the municipal operator.

Mr. Chairman, we urge several amendments to this legislation.

First, we urge that the bill be amended to insure that subscription satellite services that are generally available to cable television systems which use the streets and rights-of-way be made available under the same conditions to SMATV cable television systems which do not make use of the public streets and rights-of-way.

One-half dozen years ago the cable television industry came before this Senate seeking, and was granted similar relief in the form of pole attachment legislation which you heard an update on today. Then, as now, a monopoly communications service had control over a bottleneck in the Nation's communication service and was exercising that control to stifle competition. In both cases, legislation is required to insure marketplace competition.

We also believe that S. 2172 should be amended to prevent the cable television industry from using the franchise process as a means of creating monopolies in the Nation's telecommunications system.

Thank you.

[The statement follows:]

STATEMENT OF JOHN RAINES, CHAIRMAN, NATIONAL SATELLITE CABLE ASSOCIATION

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before you today. I am John Raines, Chairman of the National Satellite Cable Association (NSCA).

The NSCA is the trade association which represents the satellite master antenna TV (SMATV) industry. The SMATV satellite cable industry consists of individuals and small companies that install and operate fully functional cable systems in privately owned residential developments such as apartment houses, condominiums, and garden apartments typically without municipal franchise which are on private property and do not use public streets.

NSCA believes that any legislation regarding the cable communications industry must have as its ultimate objective the presentation to the American public of the most diverse and greatest number of information sources as possible. The NSCA further believes that this objective should and can be achieved by the continued adherence to the two principles which are the bedrock of the American communications systems:

1. Reliance on the Free Enterprise System, wherever posible, and the long-term socio-economic benefits which accrue from open and unfettered competition.

2. Noninvolvement of Government in the communications field, as embodied in the First Amendment, except where necessary to promote the free and open exchange of information.

The right of the satellite cable industry to exist and operate has been recognized in law and FCC policy, including operation in those areas which are subject to a municipal franchise. The satellite cable industry promotes diversity of information sources by bringing the benefits of cable to areas which, by reason of geography, economics or politics, are not served by a municipally-franchised cable operator. The SMATV cable industry also promotes and encourages diversity of information sources in areas subject to a municipal franchise by offering a competing and alternative distribution system to residential and commercial developments.

Notwithstanding the sound legal basis and recognized social and economic benefits the SMATV cable industry brings, it has been subjected to harassment and anticompetitive tactics by its competitors, who make use of the public streets and rights-of-way through grant of a municipal franchise. These competitors typically construe their limited franchise privilege as a monopoly of right and bring political and economic pressure to bear on the satellite cable operator through state and local agencies.

Many of the major satellite programming sources, which are themselves wholly-owned subsidiaries of cable conglomerates, refuse to deal with the SMATV cable industry. These program sources openly admit such a refusal is due to pressure brought to bear on them by the so-called "franchised" cable operators.

The satellite cable industry does not seek any favors. This industry simply seeks the opportunity to compete openly, freely and fairly, in the communications marketplace. To that end, the NSCA respectfully requests that Congress examine:

1. The refusal of program suppliers to deal with the SMATV and satellite cable industry,

2. The cable operators' use of the municipal franchise to secure a monopoly on the nation's wired distribution system, and

3. State and local laws that promote and protect the interests of large, well-heeled cable conglomerates at the expense of small and independent private cable operators.

Unlike the municipally-franchised cable system which has a license to use the streets, alleys, and rights-of-way of the community, the SMATV and satellite cable TV systems are built on private property to serve the residents in a private community. This type of cable service is an important part of the nation's telecommunications system. It utilizes all the elements of modern technology and blends them together to serve a large—and the fastest growing—residential market. Without SMATV cable, we estimate more than 10 percent of the population would wait longer than five years to receive a wired system, and some would never be wired by the municipal operator.

The SMATV industry performs a useful and desirable function today for a large part of the nation. This function is very similar to the role played in the 1950s and 1960s by community antenna television, cable television's predecessor, when it was the only means for many communities to receive a full complement of network television stations. SMATV cable provides competition to franchised cable, which protects the consumer and the communities from the undesirable aspects of artificial rate regulation.

Mr. Chairman, we urge several amendments to this legislation. First, we urge that the bill be amended to ensure that subscription satellite services that are generally available to cable television systems which use the streets and rights-of-way, be made available under the same conditions to SMATV cable television systems which do not make use of public streets and rights-of-way. One-half dozen years ago, the cable television industry came before you seeking, and was granted, similar relief in the form of pole attachment legislation. Then, as now, a monopoly communications service had control over a bottleneck in the nation's communication service and was exercising that control to stifle potential competition. In both cases, legislation is required to ensure marketplace competition.

We also believe that S. 2172 should be amended to prevent the cable television industry from using the franchise process as a means of creating monopolies in the nation's telecommunications system. Toward this end, we urge an amendment recognizing the legitimate rights of private land and building owners to elect to determine by whom cable television service will be provided.

Realization of the dream of a wired nation where everyone shares in the abundance of communications sources is possible. The dream will be achieved only if the legislation is structured to open up a free marketplace and permit it to make its selections unfettered by oppressive regulatory or monopolistic trusts.

Senator **GOLDWATER**. Thank you very much.

Gentlemen, I have to apologize, but I have a 1 o'clock appointment. I want to read a very short statement that I intended to read after Mr. Merrill had his crack at it.

I apologize to you, Phil, for leaving you.

I want to thank each and every one of the 54 witnesses who have appeared before this subcommittee to testify on S. 2172.

As I indicated in my opening statement, this is the first comprehensive bill that has ever been introduced in Congress on cable and it represents many months of study of cable and the multitude of complex issues which surround it.

The testimony we have received in the past 3 days has been insightful and illuminating and will form the basis for revisions in the bill where necessary.

There has been much speculation as to the future course for this bill. Some say we will never get legislation this year. My response is very short. I would not have introduced this bill unless I fully intended to steer its course through the Senate and do everything I can to have the House act in a similar fashion so that we can enact this much-needed legislation before the close of the 97th Congress.

My impression of these past 3 days of hearings is that the two main groups that are most affected by the bill, the cities and the cable industries, are not that far apart in their opinions of my bill and how it should be revised.

I want to strongly urge those groups and their representatives, as well as other interested parties, to sit down and discuss their differences and resolve their problems. My staff is available at all times to assist in this effort.

If you can reach some consensus, I am confident that this bill can sail through the Senate and then maybe we can all bring some pressure on my colleagues in the House to enact some meaningful telecommunications legislation this year.

I have said previously that I was not sure we could write this legislation. I think now that we are close and I firmly believe that we need to establish a national policy for cable this year if that industry is ever to realize its full potential.

If we don't get some legislation now, the current patchwork system of Federal, State, and local regulation of cable will be too firmly entrenched to undo. Again, my sincere thanks to all of the witnesses who have appeared. It has been most enjoyable and beneficial.

I will turn the hearing over to my staff with great reluctance because, out of the 54 witnesses, a friend of mine from my own home is the one I am going to have to miss.

Thank you.

Mr. COURSEN. Please go ahead.

Mr. MERRILL. That is all right. I believe he has heard everything I have to say anyway. But for the record I will read my statement.

My name is Phil Merrill. I am the chairman of the National Association of MDS Service Cos., NAMSCO. I am also the vice president of Tele-Features, a supplier of MDS services in Phoenix, Ariz., on two different channels. Tele-Features provides commercial-free movies and entertainment on two channels of MDS in Phoenix. I am also vice president of American Cable Television, Inc., which operates cable television systems in several communities and is currently building the cable system in Phoenix, Ariz.

I am here this afternoon to testify in favor of new section 705 of S. 2172 dealing with remedies for signal piracy. Section 705 is currently section 605 of the Communications Act of 1934, and I will refer to the current law as section 605 in this testimony.

Based on numerous court decisions, section 605 makes it a violation of the act for anyone to intercept MDS subscription programing without authorization, sell pirate down converters which would allow others to intercept such service, or to manufacture equipment to allow others to intercept the service.

NAMSCO is a small trade association consisting of companies which provide pay television services to the public over MDS microwave frequencies. MDS does not utilize broadcast frequencies, but rather utilizes transmissions of high-frequency microwave signals which are down converted by specialized equipment and then displayed on a conventional television receiver.

MDS services constitute one segment of a group of new telecommunications fare known generally as pay TV. For example, the public may also receive these services by cable television over cable attached to the customer's television set or by subscription television wherein scrambled transmissions are received, or by LPTV, as has been discussed, or even DBS.

The MDS industry is still a relatively small service numbering approximately 600,000 subscribers nationwide. Approximately 73 systems, ranging in size from 600 to 25,000 subscribers serve these subscribers in communities as large as New York, and Dallas, and as small as Carthage, Mo., and Astoria, Oreg.

A typical MDS business involves an MDS retailer, such as my company, Tele-Features, who leases time from a separate MDS licensee, such as Mr. Franco's Microband. The operator obtains programing from various sources, markets the service through advertising and rents down converters and other decoding equipment to the subscribing members of the public.

I support the piracy section of S. 2172 and its efforts against piracy. I have great difficulty understanding why anyone would object to these provisions. The bill would not change any of the substantive factors relating to unauthorized interception of signals, whether transmitted through the air or along cable or via satellite.

The only effect of S. 2172 would be to specify the limits of remedies available both to private parties and the Government in enforcing section 605 of the Communications Act against unauthorized interception of all forms of telecommuncations.

Despite numerous court decisions holding that unauthorized interception of MDS, STV, and cable signals is illegal, perhaps the most popular quote to roll off the lips of pirates everywhere remains: "The airwaves are free." This phrase has encouraged pay TV signal pirates to rally around a motto that is catchy and sounds all-American.

Advertisements and slogans of the pirates promise "a better way of viewing" and to "take the pay out of pay TV." I have attached to my testimony some of these typical pirate advertisements.[1] Indeed, copies of large advertisements by one pirate distributor called Signal Snatchers were frequently placed in the Washington Post. Another pirate ad sells a "Microwave Vacuum Cleaner" which cleans up those nasty mirowaves bombarding your home and turns them into something useful. In fact, many companies are entitled "Pirate Microwave" or something similar. I urge you to examine their approach to stealing. Unfortunately, it is not funny to the legitimate businessman.

The pirate distributor or manufacturer within several months literally can make huge revenues easily totaling $15,000 to $30,000 a month in the sale of these illegal down converters. He has a willing public ready to spend $250 to $350 to avoid having to pay $13 to $18 a month. He receives cash money and no taxes are paid. He doesn't maintain his service and the equipment is generally deficient.

The MDS industry and other pay TV providers have engaged in a hard-fought series of court cases to establish that the unauthorized interception of pay TV programing is illegal. The only thing that S. 2172 does is to deal with the matters of stronger remedies arising out of such acts.

A typical struggle under current law is illustrated by the situation right here in Washington, D.C., where Marquee Television Network, one of our members, provides MDS service. Marquee has brought several lawsuits against different local distributors of MDS pirate equipment. A lawsuit threatening damages against one local distributor produced a settlement, only to have two more distributors pop up. The litigation that has been pursued has cost Marquee nearly $60,000. It has now obtained a permanent injunction and determination of damages against one defendant which is still ongoing. This situation, unfortunately, is not uncommon.

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[1] The attachments have been retained in the committee files.

In conclusion, as I perceive the bill, S. 2172 seeks to promote maximum competition among various telecommunications media, such as MDS, STV, and cable television. It would be ironic indeed if, after fashioning such a statutory approach, the telecommunications pirates are allowed to run rampant among these legal competitors and continue their ever-increasing harm to the legitimate telecommunications business. Such illegal and unfair competition must be effectively deterred. Section 605 of S. 2172 makes a major step in this direction.

Thank you.

[The statement follows:]

STATEMENT OF PHILIP C. MERRILL, CHAIRMAN, NATIONAL ASSOCIATION OF MDS SERVICE COMPANIES, INC.

Mr. Chairman, my name is Philip Merrill. I am Chairman of the National Association of MDS Service Companies, Inc. ("NAMSCO") and vice president of Tele-Features, a supplier of MDS services in Phoenix, Arizona. Tele-Features provides the commercial-free movies and entertainment specials of Home Box Office and other programming to its paying subscribers located in both single and multifamily residences. I am also vice president of American Cable Television, Inc., which operates cable television systems in several communities and is currently building the cable system in Phoenix, Arizona.

I am here this afternoon to testify in favor of new section 705 of S. 2172 dealing with remedies for signal piracy. Section 705 is currently section 605 of the Communications Act of 1934, and I will refer to the current law as section 605 in this testimony. S. 2172 would establish, for the first time, effective remedies for violations of section 605. Based on numerous decisions, section 605 makes it a violation of the act for anyone to (1) intercept MDS subscription programming without authorization, (2) sell pirate downconverters which would allow others to intercept our service, or (3) to manufacture equipment to allow others to intercept our service.

NAMSCO is a recently organized, small trade association consisting of companies which provide pay television services to the public over MDS microwave frequencies. MDS does not utilize broadcast frequencies but rather utilizes transmissions of high-frequency microwave signals which are "downconverted' by specialized equipment and then displayed on a conventional television receiver. MDS services constitute one segment of a group of new telecommunications fare known generally as "Pay TV." For example, the public may also receive these services by cable television over cable attached to the customer's television set or by subscription television ("STV") wherein scrambled transmissions are received. Even more recently, pay television transmissions are being transmitted by low power television ("LPTV") and by satellite direct to subscriber homes, primarily in rural areas. More widespread direct broadcast satellite ("DBS") service to smaller dishes may begin in this country as early as 1983.

The MDS industry is still a relatively small service numbering approximately 600,000 subscribers nationwide. Approximately 73 systems, ranging in size from 600 to 25,000 subscribers, serve these subscribers in communities as large as New York and Dallas and as small as Carthage, Missouri, and Astoria, Oregon. A typical MDS business involves an MDS retailer, such as my company Tele-Features, who leases time from a separate MDS licensee, obtains programming from various sources, markets the service through advertising, and rents downconverters and other decoding equipment to the subscribing members of the public.

TOTAL SUPPORT FOR THE PIRACY SECTION OF S. 2172

I support the piracy section of S. 2172 and its efforts against piracy. I have great difficulty understanding why anyone could object to these provisions. The bill would not change any of the substantive factors relating to unauthorized interception of signals, whether transmitted through the air or along cable or via satellite. The only effect of S. 2172 would be to specify the limits of remedies available both to private parties and the government in enforcing section 605 of the Communications Act against unauthorized interception of all forms of telecommunications.

The approach taken has similarities to those which exist in the Copyright Act, 17 U.S.C. § 502, 504-507. It establishes equitable relief and creates a choice of actual or statutory damages for parties harmed by violations of section 605. Acts which are committed willfully and for commercial gains are subject to an additional damage provision, while in situations where the violator was not aware and had no reason to believe that his action constituted a violation the court may reduce any penalty.

In addition, S. 2172 establishes certain criminal penalties. In cases where the violator is not operating for purposes of commercial advantage or financial gain, penalties are substantially reduced from those provided by Title V of the Communications Act. On the other hand, where commercial advantage is involved, primarily in the case of manufacturers and distributors of downconverters, the statutory damages for a criminal violation are increased over those of Title V. In certain circumstances, attorneys' fees are awarded to the prevailing party.

THE "FREE AIRWAVES" CANNOT JUSTIFY STEALING

Despite the numerous court decisions holding that the unauthorized interception of MDS, STV, and cable signals is illegal, perhaps the most popular quote to roll off the lips of pirates everywhere remains, "The airwaves are free." This phrase has encouraged pay TV signal pirates to rally around a motto that's catchy and sounds all-American. Advertisements and slogans of the pirates promise "a better way for viewing" and to "take the pay out of pay TV." I have attached to my testimony some of these typical pirate advertisements. Indeed, copies of large advertisements by one pirate distributor, called Signal Snatchers, were frequently placed in the Washington Post. Another pirate ad sells a "Microwave Vacuum Cleaner" which "cleans up those nasty microwaves bombarding your home and turns them into something useful." In fact, many companies are entitled "Pirate" Microwave or something similar. I urge you to examine their approach to stealing. Unfortunately, it's not funny to the legitimate businessman.

The pirates also attempt to portray the businessman seeking to protect his business from these thieves as the "heavy," a big corporation attempting to squeeze the little guys who are just trying to make a living or, worse, attempting to snatch away the small pleasures of the family watching good television. In fact, as pointed out above, most MDS operators are small businessmen with a few thousand subscribers as their likely economic base. To the extent that pirates siphon away the MDS retailer's revenue by trading upon his goodwill, advertising, and interest generated in pay TV, the MDS retailer may be forced to degrade his service, transmit less desirable programming, and ultimately suspend operations.

In the other side, the pirate distributor or manufacturer, within several months, literally can make huge revenues easily totalling $15,000-30,000 a month in the sale of these illegal downconverters. He has a willing public ready to spend $250-350 to avoid having to pay $13-18 per month. He receives cash money and no taxes are paid. He doesn't maintain his service, and the equipment is generally deficient.

It can no longer be propounded by the advocates of signal interception that significant penalities are not justified because it is legal to "pluck" microwave signals out of the air because they extend into private air space. The technological age in which we live today has provided new means of communications offering diversity of programming into the home. Court decisions and FCC releases interpreting section 605 of the Communications Act clearly establish that such interception constitutes an illegal act. It is somewhat puzzling that the unauthorized interception of common carrier video microwave signals could be viewed by some so innocently on the basis that the "free airwaves" are utilized. Substantial voice and business telecommunications services are transmitted through the airwaves over common carrier microwave; should this be fair game for business pirates or other unauthorized interception. No one would suggest so.

SIGNAL PIRATES THREATEN THE EXISTENCE OF THE MDS INDUSTRY

The MDS industry and other pay TV providers have engaged in a hard-fought series of court cases to establish that the unauthorized interception of pay TV programming is illegal. The only thing that S. 2172 does is to deal with the matters of stronger remedies arising out of such illegal acts.

We cannot simply ignore piracy as some kind of Robin Hood adventure having minimal impact on the pay TV industry. Virtually every MDS operator is struggling with substantial piracy problems. The ads in the Washington Post, as cited above, are not unusual. Newspaper from any decent size city and video and popular science magazines are rife with advertising promoting pirate decoders, pirate microwave receivers, earth stations, and the like. Every time a signal pirate places an unauthorized MDS downconverter into the hands of a television veiwer, that family is lost forever as a potential customer for legitimate pay TV service. The loss of the revenues from such customers results in the elimination of the economic bloodstream of our industry necessary to preserve the quality of our programming service.

It is impossible to tell with any kind of certainty how much pirate activity is going on. It is clear, however, that it is widespread and growing rapidly. Indeed, in my own company's case in Phoenix, we located warehouses containing microwave downconverters ready for shipment, and we know that the defendant was shipping this equipment throughout major portions of the United States.

Because these illegal operators maintain virtually no records, it is virtually impossible to prove with the certainty required by a court of law exactly what revenue damage they have caused us. Our experience shows that whenever large-scale operators are enjoined from activities within the community, the publicity that we get causes our business to take a substantial leap, only to be diluted in a few weeks or months as other fly-by-night pirate distributors spring up again in our markets. One of the great benefits of S. 2172 is that it will allow us to obtain specific monetary damages against the pirates without having a long, drawn-out, and expensive court battle to prove actual damages.

There are other major adverse impacts of these signal pirates. They generally deter viewer acceptability of our service. There obviously is mass confusion existing as a result of the widespread publicity over who is a legitimate person with whom the subscriber should deal. Additionally, the low-quality equipment being pushed onto the street by illegal operators frequently provides mediocre reception and quality along with maintenance problems. Generally the pirate distributors are gone with few obligations to maintain their equipment should it blow down or become disoriented. As consumers tell each other about bad reception and poor maintenance, they do not indicate that it is illegal equipment that they have bought. And we, the legitimate businessmen, are left with the onus of the hit-and-run work of the pirate distributors. One final influence from such unauthorized equipment comes in diminishing the industry's efforts to obtain financing for our business operations. Again, the statutory damages set forth in section 705(c)(1) of the bill are critical in order to increase the certainty of monetary penalties for such illegal activity. This will undoubtedly increase the risk-reward ratio for these pirates to undertake what they currently view as a minimal risk situation. It will also provide convincing evidence that this Congress will not allow piracy to push the legitimate businessman into oblivion.

SELF-HELP UNDER CURRENT LAW IS NOT ENOUGH

As mentioned, recent court decisions have established clearly and convincingly that section 605 of the Act prohibits the unauthorized interception of MDS signals.

Yet the pay TV industry—MDS, STV, satellites, and cable television—is fighting in an environment of insufficient protection. I submit that the responsibility of providing legislative support is a federal one. First, the telecommunications being regulated are governed by federal law and the needed protection should be federal in nature. Secondly, legislation enacted on a piecemeal basis cannot effectively deter or punish pirates who manufacture and distribute pirate equipmant across state lines. I can tell this committee from personal experience in Phoenix that under the current situation you spend thousands and thousands of dollars to prosecute some distributors of illegal equipment and others pop up. Those who are prosecuted violate injunctions, skip town, or change company names or locations.

Unfortunately, most companies cannot afford the long, drawn-out, and expensive litigation it takes to bring a successful action, particularly when there is currently no disincentive for new pirate distributors to start up. Most companies can find only the distributors; the manufacturers of this pirate equipment are in other jurisdictions and very difficult and expensive to track down without the prospect of effective remedial action in the courts. Even if pirate manfacturers can be enjoined, our experience is that they move, operate under a different name, and begin manufacturing equipment again.

The typical struggle under current law is illustrated by the situation right here in Wahington, D.C., where Marquee Television Network, one of our members, provides MDS service. Marquee has brought several law suits against different local distributors of MDS pirate equipment. Lawsuit threatening damages against one local distributor produced a settlement, only to have two more new distributors pop up. The legislation that has been pursued has cost Marquee nearly $60,000. It has now obtained a permanent injunction and a determination of damages against one defendant which is still on-going. During this pending litigation, this defendant distributor simply violated the injunction and began selling the equipment again. A separate court proceeding was then required on the issue of contempt of court, which resulted in such a finding and a small fine. Now, many months from the time the Marquee investigation was undertaken, the case on damages is still pending and the defendant retains its extraordinary profits. At the same time, many other distributors are blatantly selling microwave downconverters in the Washington area. This situation, unfortunately, is not uncommon.

CONCLUSION

In conclusion, as I perceive the bill, S. 2172 seeks to promote maximum competition among various telecommunications media, such as MDS, STV, and cable television, in the marketplace. It would be ironic indeed if, after fashioning such a statutory approach, the telecommunications pirates are allowed to run rampant among these legal competitors and continue their ever-increasing harm to the legitimate telecommunications business. Such illegal and unfair "competition" must be effectively deterred. Section 705 of S. 2172 makes a major step in this direction.

Therefore, I heartily recommend to the committee that any new cable legislation contain the proposed section 705 dealing with telecommunications piracy. This will supplement existing law without asking the Congress to forge new ground by creating new substantive statutes where none are necessary. In other words, the bill does not create any new liability for violation of the Communications Act where none previously existed. Our association and both the cable and MDS operations with which I am personally involved urge the committee to report these piracy provisions favorably without modification.

Mr. **COURSEN**. Thank you, Phil.

On behalf of Senator Goldwater, I would like to thank all of the members of this panel and all of the witnesses that have appeared.

These hearings are adjourned.

[Whereupon, at 1:05 p.m., the subcommittee adjourned, subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF HON. LEE ALEXANDER, MAYOR, SYRACUSE, N.Y.

Cable television is one of our most promising communications media, with the potential to bring a wide range of new entertainment and information services to all consumers. In fact, we are realizing much of that potential in Syracuse today.

S. 2172 recognizes that if cable television is to fulfill its promise, policy makers must allow it to develop in a regulatory environment which will foster competition, innovation and growth. Senator Goldwater and the members of the Commerce Committee are to be commended for their efforts to create just such an environment.

There is, however, one provision of S. 2172 which would seem to diminish competition and, thus, contradict one of the bill's major goals. I am referring to Section 605(b), which, by invoking the reciprocity principle, would effectively ban Canadian-owned firms from operating cable systems in this country until Canada lifts its ban on U.S. cable companies.

This provision is of special concern to the citizens of Syrcause because our city is served by Syracuse Cablesystems, a company which is owned by the U.S. subidiary of Rogers Cablesystems, Inc., a Canadian firm. If S. 2172 were enacted, that company may be required to divest its U.S. holdings.

Any type of foreign ownership restriction represents a federal preemption of existing local authority. The City of Syracuse recognized that the federal government is responsible for determining U.S. trade and investment policy with other nations. We know, too, that the principle of reciprocity is one policy tool which is now receiving close scrutiny in Washington. But we urge this Committee to move cautiously before applying that tool to Canadian-owned cable companies, such as the one serving Syracuse.

We considered the foreign-ownership question in Syracuse and, frankly, we found it to be an irrelevant concern. So far, we have not regretted our decision. Syracuse Cablesystems has been more than responsive to our community's need, fulfilling all the terms of its ageement with us. S. 2172 threatens that fine service to our city.

If this Committee believes an overriding national interest justifies applying the reciprocity principle, then let it do so fairly. At the time Canada imposed its ownership restrictions, U.S. companies served more than 75 percent of all Canadian cable subscribers. By contrast, Canadian companies today serve less than four percent of U.S. subscribers. Until those companies threaten to dominate our market in the way U.S. companies once dominated Canada's, let local officials decide whether or not to accept service from a Canadian firm.

The National League of Cities has recommended just such a policy to this Committee. The U.S. Conference of Mayors has urged similar restraint in the past. The City of Syracuse heartily endorses this position.

If the Committee decides to retain Section 605(b), then it should consider revising the provision so that the legislation would not affect existing franchises held by foreign-owned firms.

Regardless of the intentions of the bill's drafters, the legislation does not "grandfather" Canadian cable companies now operating in the U.S. Is the Committee planning to amend Section 605(b) to clarify its intention? We certainly hope so. And we hope, too, that we will have ample opportunity to review and comment on any changes.

Although an amendment to "grandfather" existing systems would provide important protection for cities currently served by Canadian firms, it would not address the issue of refranchising. Could the City of Syracuse, for example, renew the franchise of Syracuse Cablesystems when it expired? Or would we be required to develop a new working relationship with another company that may purchase the system?

Grandfathering may prevent disruption of service to our citizens, but it would not prevent the disruption of a satisfactory relationship between our city and the cable company which provides that service. As I've noted, we are pleased with that company's performance. If our franchise agreement were to expire tomorrow, we would not look forward to establishing a new relationship with a new company. And yet, that is precisely what S. 2172—even if amended—may force us to do.

We urge this Committee to allow us to retain the freedom to renew the franchise of the existing company if we so choose. Indeed, we urge you to grant the same freedom to local officials in Atlanta, Portland, suburban Chicago and other communities now served by Canadian companies.

Cable is a local communications medium. There is no more important local decision than that of which company should hold a franchise. We hope this Committee will preserve the freedom of all local communities to choose among all competitors unless there is a truly compelling reason to restrict it.

STATEMENT OF KENNETH D. ANDERSON, COMBINED CABLE CORP.

Mr. Chairman, I want to thank you for the opportunity to submit my views on S. 2172, "The Cable Telecommunications Act of 1982," which you and Senator Kasten have introduced.

First, let me tell you something about Combined Cable Corporation. Combined owns 13 cable systems serving 22,000 subscribers in several states, including Wisconsin, Illinois, Iowa, Arkansas and Texas. We are also in the process of buying a system in Prescott Valley, Arizona. The sytems which we own are located in small towns and rural areas. As a result, I can give you a perspective on the impact of your bill which you won't get from the MSOs that operate in much larger markets.

I want to congratulate you, Mr. Chairman, for your willingness to take on these cable issues. The deregulated environment which your bill seeks to establish will aid the growth of the cable industry, permitting greater innovation in technology and services.

However, I would like to focus my remarks on one section of the bill which troubles me greatly from the perspective of a small system operator. The requirement that we set aside 20 percent of our channels for lcoal and leased access would place a tremendous burden on our systems with very little corresponding benefit to our subscribers.

Most of our systems carry fewer than 20 channels and many provide only 12 channels. While all of our systems are capable of providing more than 20 channels and would, therefore, fall under the purview of your proposed rules, this could only be accomplished through the addition of new converters and other technical modifications.

The costs of making these changes would have to be borne by the already overburdened consumers who would be forced to pay for the needless upgrade in capacity. If the systems are not upgraded, then requiring us to reserve channels for access may mean that we will have to deny subscribers services which they receive currently and value highly, such as television signals from distant markets, satellite services like ESPN and Cable News Network, and pay services like HBO and Showtime.

Frankly, I cant' see why the decision on local access should be made by the Federal Communications Commission—a federal agency that can't possible be expected to determine the special needs and interests of each community we serve.

I understand that it was not your intention to apply the access requirements of Section 606 to smaller systems—those with fewer than 20 channels. If that is the case, then the wording of Section 606(a) needs to be changed. As it is currently drafted, that section applies to any cable system with 20 or more channels or with 120 MHz or more of bandwidth "for immediate or potential use." This would affect not only modern systems but also nearly every cable system in the country, because, while many systems have fewer than 20 channels activated, practically every system has 120 MHz or more of bandwidth which could be used if you include the midband channels.

Let me explain why this is true. A standard 12-channel cable system carries channels 2 through 13. Since the lower edge of channel 2 is 54 MHz and the upper edge of channel 13 is 216 MHz, every 12-channel system has a total bandwidth of 162 MHz (216 MHz minus 54 MHz).

While the twelve channels account for only 72 MHz of bandwidth (12 × 6 MHz per channel), there is a gap of 86 MHz between channel 6 and channel 7 as a result of the allocation of TV channels. In most cable systems, this bandwidth can be used if converters are added by the suscriber. Under the standard in S. 2172 as drafted, these 12-channel systems would be included in the access requirements.

If you do intend to exempt small systems, the bill should be amended. While I have reservations about the wisdom of the federal governments requiring any cable operator to set aside access channels. I would be less concerned about the impact of your bill on Combined Cable if this change were made.

I would be happy to supply language to the Subcommittee which would alleviate the problem. Until, and unless, this matter is resolved, Combined Cable must withhold judgement on the bill as a whole.

I hope that S. 2172 can serve as the vehicle for the constructive national cable legislation which the industry so badly needs. Thank you once again for the chance to submit this statement.

Statement of Leslie G. Arries, Jr.

Mr. Chairman and Members of the Subcommittee, I am president of Buffalo Broadcasting Co., Inc., licensee of Television Station WIVB-TV, Buffalo, New York, a so-called Canadian border television station. I herewith submit the following comments on the foreign ownership provision of Section 605(b)(1) of Senate Bill 2172. This important legislation is under consideration by your committee.

I concur in the conclusions and reasoning advance by a number of other witnesses supporting Section 605(b)(1). Briefly summarized, the major argument favoring enactment of this provision is that foreign ownership of cable systems in this country has accelerated to the point where a national policy should be established instead of leaving the matter in the hands of local decisionmakers. The agency most suited to this task, the Federal Communications Commission, has twice declined to adopt rules restructing foreign ownership. Section 605(b)(1) would clarify the authority of the FCC to regulate foreign ownership as well as provide guidance on Congressional intent concerning this subject. In addition to comments already advanced in favor of Section 605(b)(1), I offer for your consideration and that of other Committee members my observations on this provision.

Section 605(b)(1) is a welcome step towards redressing the discrimination which has resulted from the heretofore announced efforts of Canada to advance its culture and economy at the expense of U.S. business interests, and particularly broadcasters. The concept of reciprocity embodied in the proposed legislation is similar in theory to other approaches endorsed by President Reagan for dealing with Canada. In response to a repressive law adopted by the Canadian government, later found to be a restraint upon trade by the Special Trade Representative under Section 301 of the Trade Act of 1974, which substantially and meaningfully affected U.S. border brodcasters, the President urged Congress to introduce and pass legislation to "mirror" the Canadian law.

The legislation advocated by President Reagan would penalize Canadian broadcasters in the same way that Canadian tax laws deny millions of dollars in advertising revenues to U.S. border broadcasters. As a result of the President's efforts, both the Senate Subcommittee on International Trade of the Commerce Committee and the House Ways and Means Committee have bills pending before them to accomplish this goal. Canadian tax law presently discourages Canadian companies from advertising on U.S. stations by not allowing income deductions for such advertising. The proposed legislation "mirrors" the Canadian law by disallowing deductions for U.S. companies who advertise on Canadian stations. The bills also provide that should Canada repeal its law, we will repeal ours. This "fight fire with fire" approach is the spirit of the reciprocity provision in S. 2172.

Legislation such as Section 605(b)(1) and the "mirror" provisions are necessary in the face of Canadian protectionism towards its broadcasters. Another flagrant symptom of this attitude is reflected by the impunity with which Canadian cable companies pirate U.S. broadcasters' signals. Since there is currently no enforcement mechanism to curb this practice or to insure compensation for U.S. broadcasters, Canadian broadcasters again have the upper hand vis a vis U.S. broadcasters.

Section 605(b)(1) is not an unwarranted barrier to foreign investment as its opponents would have us believe, not is it an attempt to restrict trade. Rather, the goal of the legislation is to induce the Canadian government to change its policy towards U.S. cablecasters and broadcasters. Section 605(b)(1) is an open invitation for the mutual freedom to do business.

Statement of Cable Television Access Coalition, Inc.

The Cable Television Access Coalition, Inc. is a nonprofit organization of over 80 community groups and individuals working to foster public participation in the development of cable television in Boston. Our aim is to insure that Boston's cable system serves the diverse needs of all the city's residents. We wish to comment on several of the provisions of S. 2172, particularly those dealing with public and leased access.

PUBLIC AND LEASED ACCESS

The Coalition believes strongly in the First Amendment goal of insuring "the widest possible dissemination of information from diverse and antagonistic sources." Toward that end we have worked in Boston to insure the maximum opportunities for both public and leased access, and we have advocated a regulatory structure that furthers those ends.

We support the concept of requiring minimum numbers of public and leased access channels; however, we believe the percentages specified in this bill are far too low. Thus, we support section 606 of this bill, which requires that 10 percent of channels (in systems with 20 or more channels) be set aside for public, educational, and governmental access, and another 10 percent for leased access; but we oppose section 603(1), which preempts the rights of local governments to require more than these percentages.

In Boston, the City recently negotiated a Provisional License with Cablevision Systems Boston Corporation under which a nonprofit corporation, the Boston Community Access and Programming Foundation, Inc., will control 36 percent of the 100-channel institutional loop and up to 20 percent of the 114 subscriber channels. The City determined, after much study and two advisory committees, that this approach would be the most effective way to provide public and institutional access and community programming to the residents of Boston. It is important that this bill in no way invalidate the contract negotiated between the City of Boston and Cablevision.

We also urge that the bill raise its limit on the number of leased channels that a state or municipality can require. Henry Geller persuasively argued in a recent petition to the Federal Communications Commission for a mandated 20–25 percent of channels for leased access (on 100-channel systems),[1] and the National League of Cities proposed to this committee a figure of 30 percent.[2] Others have advocated a total separations policy, under which the cable operator would control only the hardware and have no control over programming.[3] While we would not advocate a total separations approach, we are convinced that a large number of leased access channels offers the most effective and least intrusive method for insuring that cable offers the economic competition and diversity of expression that all parties agree is desirable.

We would favor either of these two approaches: (1) keep this bill's 10 percent public, 10 percent leased as minimum requirements, but allow local authorities to require or negotiate for more; or (2) adopt a national 50 percent access standard in line with this model: deduct from a system's total channel capacity the number of stations required to be carried by FCC rules ("must carries"), and require that half of the remaining channels be made available to entities other than the cable operator through public, educational, municipal, or leased access (the remaining half of discretionary channels would continue to be programmed and controlled by the cable operator).

We are particularly disturbed that the access provision of S. 2172 has been interpreted by the bill's author as allowing the 10 percent leased access obligation to be satisfied by the carriage of pay services. The Boston system will carry 11 pay services—which is coincidently 10 percent of the system's 114 subscriber channels; similar ratios hold in other, smaller capacity systems. Thus this bill's pretense of assuring channel capacity for leased access turns out to be a mirage.

Current arrangements for pay channels give an operator the right to choose which services to carry and what rates to charge subscribers; the operator in turn pays a fixed amount per subscriber to the program source. The financial arrangement is that of an operator-provided service, not a leased service. Only in cases where the pay service programmer (1) is allowed nondiscriminatory access to the system and (2) determines subscriber rates and controls the funds paid by subscribers for the service should such a channel be considered a leased channel. This committee should clarify this critical distinction between operator service and leased service.

Two other provisions in this bill regarding public and leased access also concern us. First, the prohibition against rate regulation for use of leased channels in section 607(c) will enable cable operators to refuse to lease out channels simply by setting an artificially high price for leasing. Past experience has demonstrated that, given their choice, many operators will refuse to allow competing companies to offer programming and services on cable channels.[4] While we are sensitive to the problems inherent in common carrier type regulation, it is crucial to find some way to insure that cable operators comply with the intent of this bill by actually providing channels to third-party programmers. One way to do this would be to impose some type of rate-of-return regulation only on those systems in which the mandated leased channel capacity was not being utilized; systems that were actually leasing channels on their own would not be regulated.[5]

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[1] Petition for rulemaking, RM-3999 (October 9, 1981).

[2] Statement of Charles Royer, mayor of Seattle, at field hearing, January 18, 1982.

[3] E.g., Cabinet Committee on Cable Communications, Report to the President (1974).

Second, the exclusion of public and leased access channels from the definition of "basic service" in section 604(1) will allow cable operators to place public and leased channels on high-level tiers that few subscribers could afford—thus circumventing the intent of this bill's access provisions to foster competition and diversity of expression. At the very least, the public, educational, and governmental set-asides under section 606(a)(1) should be included in the definition of "basic service." Leased access programs carried under section 606(a)(2) should also be included, unless taken out of that category with the consent of a leased channel programmer in exchange for reasonable compensation (i.e., if the leased channel programmer shares in the extra revenues generated by that programming).

Finally, we strongly support section 608, which removes the cable operator from liability for programming produced by third parties. We consider this principle so important that we have filed a bill in the Massachusetts legislature that would accomplish this same objective.[6] If cable operators are responsible for libel, slander, obscenity, and other violations that may occur over access channels, then they will insist on controlling the program content as well. This provision puts liability where it belongs—with the producer actually responsible for the programming. The provision marks an essential step toward realizing the intent of the access requirements—to provide for a diversity of independent voices. We would, however, suggest adding the words "state or federal" before the word "laws" on line 15 to make explicit the scope of this provision.

CROSS-OWNERSHIP

We oppose section 605, which would eliminate the FCC's television-cable cross-ownership restrictions as well as the Massachusetts newspaper-cable restrictions. Cable television, broadcast television, radio, and newspapers are currently the principal players in each local communications marketplace. The so-called new technology services—even if they ever achieve significant market penetration—will generally provide only national, not local, information services.[7] Allowing any two of these media to be owned by the same entity in a given locality would cause a significant loss both in terms of economic competition as well as in the number of different voices in the marketplace of ideas.

We are in favor of newspapers leasing some cable channels to provide local news and information; however, we would not want the newspapers controlling all cable channels. Recently, for example, The Boston Globe announced a joint venture with Knight-Ridder to provide videotex service in Boston. We look forward to this service—but we would not want to see the Globe, which is the dominant source of local news in the city, control the entire Boston cable system.

We would not oppose eliminating cross-ownership restrictions should a policy be imposed, such as the one we have recommended, where half of the cable channels are available to entities other than the cable operator. Under these circumstances, the dominant position of the operator would be reduced and there would be sufficient opportunities for alternative voices within the cable system itself. But S. 2172 as it presently reads would not accomplish this.

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[4] See Geller petition at 6-11.

[5] See id. at 52-53.

[6] S. 422 (1982). The New England Cable Television Association has endorsed the liability provision of S. 422. See Cablevision, May 10, 1982, at 270.

[7] See majority staff of the Subcommittee on Telecommunications, Consumer Protection, and Finance, U.S. House of Representatives, 97th Cong., 1st Sess., Telecommunications in Transition: The Status of Competition in the Telecommunications Industry 342-344 (Nov. 3, 1981); also Geller petition at 6-7.

SUBSCRIBER RATES

We oppose section 607, which allows regulation of subscriber rates only for the retransmission of broadcast signals (as the definition of "basic service," beyond such retransmission, is entirely discretionary with the cable operator under section 604).

This bill would not allow rate regulation for the many services that are presently available only on cable—such as local origination, public access, local educational and governmental access, all news, foreign language, and programming for the elderly and for children. As technology develops, some of these services may be carried on other distribution media, such as multipoint distribution service or direct broadcast satellite. However, many cable services, particularly local services, will probably never have a viable means for distribution except through cable. A subscriber's only alternative to paying rates set by a cable operator would be to forgo these services entirely.[8]

We feel that the option should be left open for local governments to regulate unique cable services, not only because of their monopoly characteristics, but also because some of these services—such as educational programming and information about local issues—are closely tied to the constitutional need for an informed and educated citizenry.[9]

If cable systems were required to carry significant numbers of non-operator channels on basic service—or at rates set by channel lessors—then rate regulation would not be necessary, since there would be effective price competition within each cable system. However, because the nonoperator channel requirements are set too low, such is not the case under the current proposal.

On first glance, the rate deregulation provision would not seem relevant in Massachusetts—since in 1980 the Massachusetts Community Antenna Television Commission suspended rate regulation in all communities where there was acceptable over-the-air reception of three unduplicated network television signals.[10] However, the Massachusetts rule included two important safeguards that this bill would preempt. First, the CATV Commission pledged to review annually, beginning in 1984, which cable services have attracted wider consumer interest and to reimpose rate regulation for those services that it finds have no competitive alternatives. Second, the Commission will monitor the validity of its assumption that marketplace forces alone will ensure reasonable rates, and it can modify its rule as appropriate. The Massachusetts Commission recognized the experimental nature of its ruling,[11] and it included both flexibility and a mechanism for review. S. 2172 would prohibit any further review of a rapidly changing industry; it would preempt all state regulation based on a marketplace assumption that has never been tested.

OTHER PROVISIONS

We would modify section 610, dealing with fairness and candidates access. While we agree that the current sections 312(a)(7) and 315 of the Communications Act can be overly intrusive, we also wish to ensure that cable systems actually provide access to candidates and the opportunity to discuss controversial issues. Clearly the intent of this bill's public and leased access requirements are to provide this access to all candidates and other persons in a timely fashion. Therefore, the provision should suspend these sections of the act only on systems where such free and timely access exists.

We support section 612, which protects individual privacy. However, we do not wish to preempt the rights of local authorities to make more stringent regulations, as may be called for by changing technology. We would suggest, therefore, that in section 612(f), the last sentence be extended by adding the words: "and does not preempt state or local laws, regulations, or franchise restrictions that afford more protection of privacy than provided by this section."

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[8] See footnote 7. We disagree with those who say that cable effectively competes with nonvideo conduits such as newspapers, magazines, libraries, theaters, or local meetings. Based on actual consumer behavior, the relevant market is the video market. See Telecommunications in Transition at 326.

[9] See *San Antonio Independet School District* v. *Rodriguez*, 411 U.S. 1, 36 (1973) (electoral process depends on educated electorate); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969) (public has right to receive social, political, and other ideas).

[10] Report and Order in Competitive Standard Rulemaking, Docket No. R-4, at 7; 207 Code of Mass. Regulations § 6.53.

[11] The Commission said that the body of comments and supporting data which it accumulated, "while compelling, is to a large degree intuitive. Hard evidence regarding the elasticity of demand among or between cable and other communications services is either tentative or nonexistent. Little is known regarding cable consumer preferences for single or bundled packages of cable services or their competitive substitutes. The record does not contain specific information regarding the variability of these relationships when geographic location, cable system channel capacity and current cable service offerings are taken into account." Report and order at 11-12.

We support section 615, ensuring equal employment opportunity.

CONCLUSION

We commend Senator Goldwater and the members and staff of this committee for a comprehensive and thought-provoking bill. We urge that it be modified as we have recommended.

STATEMENT OF JOHN P. CLEARY, DIRECTOR, NEW JERSEY OFFICE OF CABLE TELEVISION, CHAIRMAN, CONFERENCE OF STATE CABLE AGENCIES

For many years there has been an unquestionable need for a certain and consistent national policy in telecommunications especially regarding cable television. The present bill, S. 2172 represents the latest effort in that direction, but ultimately it will create more problems than it will resolve. For this reason I must register opposition to the bill in its present form.

As the Committee is well aware, the literature and history of cable television is replete with discussions on the local aspects and benefits of cable television. There are national interstate aspects as well, but in its attempt to address the latter concerns S. 2172 removes virtually all state and local authority over the former. Even the FCC in asserting preemptive jurisdiction during the 1970's, recognized that the federal government lacked the proximity and resources to adequately regulate the uniquely local cable matters.

Once enacted this bill would lock us into questionable policy approaches that could not respond quickly enough to rapid changes in the technology and market place. The current deregulatory atmosphere may not last long considering the growing concentration in system ownership and the drift of cable communications toward the "essential-service" type classifications. Any bill must fully consider policy needs (such as widest availability of basic service) as well as market place economics.

This bill would eviscerate state and local authority to regulate even the most localized and vital aspects of cable systems and their operation. it would discourage statewide cable legislation in franchising and rate regulation—precisely the areas where perception of strong state regulatory authority is essential for the integrity of the process and the industry.

Aside from the foregoing generalized objections, there are a number of specific questions raised by the present bill:

OWNERSHIP AND CONTROL

The most significant problem with the bill, about which I feel very strongly, is the bill's failure to provide any assurance as to the suitability and character, financial responsibility, and technical competence of system owners and operators. As it stands, subsection 605(a) totally precludes any consideration or regulation of these elements by any level of government. Indeed, the subsection arguably requires that a cable franchise be awarded to anyone requesting one. No discretion is left to the franchising authority. It does not take much imagination to realize the litigation and problems arising from such a provision would be endless and overwhelming. Nobody could be denied a franchise. The resultant chaos would put the franchising process back where it was in the 1960's. Development of new cable services would be retarded correspondingly.

While most states and municipalities are aware of having prohibited exclusive franchises, the practical economics of the industry have limited franchises to one, or in less than a dozen instances, two systems within a given territory. In the latter instances franchises have found themselves literally racing down the streets with each other. Under this bill, there would be no mechanism for dealing with the multiple applicants for limited utility pole space. One also can envision the costs of duplication and lower technical quality that such races would ultimately be borne by the public.

The rarity of municipally owned cable systems demonstrates this nation's traditional resistance and outright rejection (as in St. Paul recently) of government ownership in telecommunications in contrast to the common European policy. Senate bill 2172 reflects the American attitude, without a full prohibition. Apparently only purchase of existing systems will be permitted under Sec. 605(c). The language implies governmental construction or ownership of new systems is prohibited. This will create a problem for municipalities where, service is needed and desired, but where, for technical and economic reasons, service would be unavailable absent governmental construction and ownership. An exemption on petition to the FCC should be included to cover these cases. A heavy burden of need would have to be demonstrated by the municipality seeking exemption.

Finally, where ownership is permitted, it is not entirely certain that the bill assures a desirable degree of governmental separation from program control. The greatest objection to direct or indirect government ownership or control of a cable communication is that based on the First Amendment.

DEDICATED ACCESS CHANNELS

Although the FCC channel access requirements were abrogated by the Supreme Court, the concept of them has become ingrained with the public interest and CATV policy objectives. I question the appropriateness of preemptive federal jurisdiction over access. By its nature, access is a particularly local concern. The need and demand for these channels will vary from one municipality or system to another. Even the minimal requirements of S. 2172 do not recognize this.

Federal concern with access channels might be justifiable in the context of an interstate interconnection policy, but the bill does not touch upon interconnection of cable systems. We hope the Committee would direct its attention to the broader question of interconnection. Until it does, access remains a purely local question which should be determined solely by state and local officials.

The Committee should consider the bill's impact upon smaller systems, with 21 or fewer channels. These systems are saturated with either mandatory channels or limited numbers of pay or origination channels, and need their revenue if they are ever to expand capacity by rebuilding. If the access requirement remains, the 10 percent requirement can be burdensome for systems with under 35 channels. An alternative would be an exemption upon a specific showing by the system that the statutory formula would be burdensome.

RATE REGULATION

The federal preconclusion in S. 2172 of all rate regulation except "basic service" opens the door for cross-subsidization of cable television services ultimately, a separations policy will be necessary under this structure. The bill also prevents state or federal action to assure the continuing financial soundness of cable TV companies. The definition of "basic service" (Section 604(1)) is problematic. Are "broadcast stations" retransmitted over satellite to be treated as "broadcast retransmissions by intermediary relay stations?" (Section 604(5)) If such a "broadcast" signal is intended for receipt by the public, should a premium charge for such a signal over and above the "basic service" charge be permitted? These problems are resolved by expanding the definition of "basic service" to include broadcast station signals that are presently optional under FCC rules.

In leaving the inclusion of other services and signals to the cable operator S. 2172 further erodes the local franchising authority. Implicit in the definition is the notion that a local authority cannot require inclusion of a broadcast channel or a particular service in the system's basic package.

Permitting a wide variation in the basic package at the operator's whim would leave the subscriber with an uncertain product. The franchising authority would have no bargaining chips, and basic service rate determination would bring a subjective evaluations of program quality as channels or programming was shifted in and out of the basic service.

Finally, there is no inclusion of local origination and access channels in the basic service definition. Without these channels, the essential policy objectives of making cable and its benefits readily available to the most people are defeated.

CONCLUSION

Broadband cable communications, more so than emerging alternative communications such as DBS and MDS, contain localized features that should remain within the jurisdiction of state and local officials. The incidents of franchising, rates, access channels are primarily local in impact.

State authorities have the proximity to local communications issues and concerns, coupled with the ability to rise above local politics. They also have the expertise, expert staffs who deal with cable communications on a daily basis. Local franchising authorities deal with these issues infrequently, and must face an industry and technology which was complicated enough ten years ago, and is growing more complex daily.

More significant than the expertise is the fact that given the right state regulatory environment, the cable communications revolution will thrive. In New Jersey, this is just what occurred in the 10 years since enactment of our Cable Television Act, N.J.S.A. 48:5A-1 et seq. With 464 (as of January 1, 1982) of 567 municipalities franchised for cable television, the state is within a year or two of being the first totally cabled state. From 1973 through 1981 the number of subscribers grew 440 percent, plant mileage 600 percent, and gross revenues an estimated 1,240 percent according to New Jersey Office of Cable Television data.

In 1981 alone system plant mileage in the state grew 32 percent. This is twice the national average and most individual states under the same state regulatory framework. Basic service charges average $7.39 a month, the second lowest in the United States. Eight of the top ten cable companies have invested in our State. As one of the few states fully regulating cable TV, New Jersey's cable record disproves the myth that state regulation will inhibit cable growth.

To briefly summarize, the principal difficulty with S. 2172 is that it removes any meaningful authority from state and local franchising authorities. The limited powers they now have to regulate cable television make it difficult enough to negotiate and enforce franchises in the public interest. Without the power to deny ownership to the unfit and unqualified, the localized nature of many cable services is threatened, and other aspects of local presence, such as the use of municipal streets remain.

STATEMENT OF COX CABLE COMMUNICATIONS, INC.; MIDCONTINENT BROADCASTING CO.; MULTIMEDIA CABLEVISION, INC.; SAMMONS COMMUNICATIONS, INC.; AND TRIBUNE PUBLISHING CO. D/B/A CABLE TV PUGET SOUND ON S. 2172

Cox Cable Communications, Inc., Midcontinent Broadcasting Co., Multimedia Cablevision, Inc., Sammons Communications, Inc., and Tribune Publishing Co. d/b/a Cable TV Puget Sound ("the Companies") are owners and operators of cable television systems serving communities throughout the United States.

INTRODUCTION

Preliminarily, the Companies wish to commend the Chairman and the other sponsors of S. 2172 on this forward-looking, necessary legislation. These Members and the majority staff clearly devoted much time and effort to research and draft the bill, which as a result represents a thorough understanding of a complex, constantly evolving and highly technical subject.

There has long been a need for congressional delineation of the jurisdictional boundaries over CATV. The history of CATV regulation has been marked by inconsistency and uncertainty for CATV operators and regulators alike. Senator Goldwater recently recognized the adverse impact of this history and the need to avoid its repetition in the furture, stating in his speech before the National Cable Television Association, "If no changes are made, we will be faced with a continuation of the long, disruptive, regulatory and court challenges that have been characteristic of the past fifteen years."[1]

The legislation which he introduced will help to avoid this possibility. S. 2172 would not only resolve uncertainty by defining regulatory boundaries, but it would do so in a manner conducive to CATV's optimal future development.

The need for this type of Congressional guidance becomes more imperative with the phenomenal increases in the technical sophistication and range of services offered by CATV and its competitors. In the past few years, developments have been staggering. Service concepts which only a few years ago could be dismissed as totally speculative are today's marketplace realities, or are on the brink of becoming so. Interactive CATV services, STV, MDS, videotex and teletext, videotape and video disc, low power television and direct broadcast satellites, once exotic notions, are now realities and in some cases, commonplace. Again, the Chairman is to be commended for his forward-looking analysis of cable's new enhanced service offerings: "Although your industry's provision of nonentertainment or enhanced services is in its early stages, I have every reason to believe that technology and consumer demand will make these services an important part of your business faster than you or I can imagine."[2] Government regulation, particularly state and local, which inhibits the development of any of these new media can discourage future investment in research and development of the type needed to keep the American communications industry in its position of world leadership.

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[1] Speech by Senator Barry Goldwater before the National Cable Television Association, May 4, 1982.

Unnecessarily burdensome regulation of interstate communications media benefits no one. S. 2172 reflects recognition and application of this principle to cable television: its keystone is its recognition that cable television and related, rapidly developing communications media are interstate in nature and therefore require a uniform nationwide regulatory environment, not a capricious patchwork of local regulations. For too many years, CATV's growth was stunted by federal regulations designed to protect the so-called "free" broadcast services. Now, overregulation at the local level presents a similar but even a more serious threat to fulfillment of CATV's potential. S. 2172 goes a long way toward rectifying the situation by situation by allocating federal, state and local regulatory responsibility in most instances where it belongs and by curtailing the dangers of overregulation at all three levels.

LOCAL REGULATORY RELATIONSHIPS

Limits to municipal regulation Some of the legislation's most significant provisions in this regard are those affecting relationships between state and local CATV franchising authorities and the CATV systems they regulate. These provisions would, if adopted, add a much-needed federal presence to local regulatory decisionmaking. This cannot happen too soon.

Recent years have seen a developing trend toward increasing local government involvement in the day-to-day operations of CATV systems. Although some forms of local regulation are, of course, legitimate functions of the policy power pursuant to which franchises are issued, the type of regulation which prompts the companies' concern is of a far more intrusive nature.

Beginning with requests for proposals, cities may include one requirement after another, often compiling such extensive lists of requirements that responsible companies simply refuse to submit bids. For example, cities may require provision of excessive numbers of access channels or unreasonable conditions on their use, neither of which has any discernible relationship to the actual needs of the community. Or they may include buy-out or rate regulation provisions which are so onerous that obtaining financing becomes virtually impossible. Or they may impose fees and hidden charges which preclude responsible financial arrangements for the system. In many cases, these constantly changing and increasing demands are caused by pressures from local groups, some of which have testified before this Subcommittee, which have very limited goals and interests. Most, unfortunately, have little understanding of the broader, interstate communications issues involved. The lack of knowledge of the practical and economic realities of the industry's modern financing, construction and operating concerns is often appalling.

When excessive municipal demands are made, cable subscribers suffer. If Requests for Proposals deter responsible bidders, subscribers may have to wait for institution of service and may also lose the opportunity to receive service from the best qualified company. And if obligations imposed at mid-term affect a franchisee's operating capabilities, subscribers may begin to experience reductions in service when a company finds that it cannot implement a proposal which it had to accept as a condition of continued operation.

Representatives of local regulatory authorities who have testified concerning this legislation fail to acknowledge these realities of overregulation, and instead seek to perpetuate and even expand their jurisdiction over cable television operations. They urge, for example that they should be permitted to require more access channels than the maximum number thereof permitted by Section 606 of the bill. They argue for more, not less, control over CATV programming decisions, notwithstanding the obvious First Amendment problems which would accompany such jurisdictional expansion. They want the right to control rates for as many CATV services as possible, completely ignoring the efficacy of marketplace forces in protecting consumer interests. They seek to be able to impose franchise fees without the limit of a federal ceiling, action which would pave the way for abuse of CATV as a source of revenue for depleted municipal coffers. They argue that they, not the FCC, should impose technical and service standards, ignoring the FCC's long-developed and recognized expertise in this area. In short, cities want all the regulatory authority over CATV they can get.

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[2] Id.

They argue that such all-encompassing regulatory authority is necessary to ensure CATV operations which are responsive to local needs. But what could be more responsive to local consumer demands than a cable system unfettered by local regulation and therefore free to respond directly to the pressures of the local marketplace? The cities' demands for more regulation are thus not only contrary to the bill's recognition of the adverse effects of excessive regulation, but they ignore the ability of the marketplace to achieve public interest goals. By contrast, as Senator Goldwater notes, S. 2172 establishes "a policy framework that relies on marketplace competition whenever possible" [3] and in general makes a most admirable start in limiting the potential reach of unnecessary local regulation. For example, its prohibition on most types of local regulation and preemption of access channel requirements are long overdue. The bill, however, is still open-ended, and apparently would not preclude Requests for Proposals which circumvent its intent by asking for, but not requiring, bids which exceed its limitations. It is an unfortunate fact of life that a city's mere "asking for" a proposal can be just as effective as stating a specific requirement therefor due to the obvious political and regulatory power of the franchising authority. Similarly, at midterm in particular or in a franchise renewal situation, the franchisee has too much to lose to simply abandon its operations, and is thus effectively at the mercy of the franchising authority's "requests."

This effective municipal leverage cannot be ignored. Instead, as the President of NCTA has stated, "The playing field should be level." The companies therefore urge the Subcommittee expressly to limit local authorities' ability to regulate or require, directly or indirectly, provision of services beyond that which is expressly permitted by the bill, by modifying the language of Section 603 as suggested in the Appendix to this Statement to make clear that federal authority over the matters dealt with in the Bill is totally preemptive and exclusive.

This clarification and restriction of the limits of local jurisdiction through federal preemption are necessary to prevent indirect but nonetheless effective municipal regulation from undercutting the salutary impact of the bill's effect and intent. It is also needed to prevent local authorities from regulating matters the bill deals with, albeit not in specific terms. Either type of local regulation has the pernicious potential for inhibiting CATV's full future development in the public interest.

The cities have vigorously argued before this Subcommittee for substantially open-ended regulatory authority. This cannot be allowed, lest the bill's purposes be gutted. As Senator Goldwater has correctly recognized, "Regulation at all levels must be confined to that which will achieve purposes not met by competition and must be entirely prohibited where First Amendment rights are at stake."[4]

Renewal expectancy.—Paramount federal regulatory authority over matters dealt with by the bill is thus a necessary check on the overregulatory inclinations of local governments. But the potential for local overregulation still exists in areas not totally preempted.

One such area involves franchise provisions which call for a municipal buy-out at the end of the initial franchise term. The municipal ownership which results from implementation of such provisions is, as demonstrated herein at pages 31–36, undesirable and ultimately benefits no one. The companies would therefore urge that the legislation be amended to give specific recognition to franchisees' legitimate renewal expectations and to prohibit entirely municipal buy-out provisions in franchises.

An investment in a CATV system represents an enormous capital commitment. In new major markets, cable systems must invest $700–$900 per subscriber in order to construct systems having sufficient channel capacity and interactive capability to meet city and competitive demands. Very few, if any, other service industries commit revenues of this magnitude per customer. A system also represents a nonmonetary but nonetheless significant commitment to a community and to communications service.

Companies which make these commitments and which are conscientious and effective in fulfilling them should not be "rewarded" at the end of their franchise term by what is, in effect, municipal confiscation of the results of their efforts. There is no precedent for such "windfall" provisions in franchises. Clearly, cable operators who provide good service have earned more: they are entitled to expect that their franchises will be renewed and on reasonable terms.

Similar considerations apply in the situation where a franchisee seeking renewal must do so in competition with new and untested applicants: an incumbent franchisee which has satisfactorily performed his franchise obligations and is not in default thereof should not be required to participate in comparative franchise renewal proceedings on the same basis as a new applicant who seeks to take over the franchise. It is very easy to come into a market which has been served effectively for a number of years by an existing franchisee and to submit more paper promises than the incumbent. But such promises are only that—paper ones—and cannot be fairly compared with the actual performance of an existing franchisee.

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[3] Id.

[4] Id.

At the end of an initial (or renewal) franchise term, fairness and common sense demand that recognition be given to the past record of an incumbent and his right to expect a reasonable franchise renewal. Only where there is a record of ignored, material franchise obligations or demonstrably substandard service is it appropriate to consider alternative ownership. But where a franchisee has conscientiously and effectively fulfilled its obligations under a franchise and has not violated its terms and conditions, then it is completely inequitable to penalize that performance by permitting the city to buy the system or by requiring the incumbent to seek renewal on the same basis as a new applicant. Instead, the incumbent's right to expect reasonable renewal must receive tangible, statutory acknowledgement.

The wisdom of a legitimate renewal expectancy already enjoys wide acceptance. The FCC, for example, has recognized that substantial equitable arguments favor a renewal expectancy for incumbent broadcast licensees. The Supreme Court, in its decision on broadcast-newspaper cross-ownership, agreed.[5] And this Subcommittee, too, has had occasion to consider the matter: S. 601, introduced last year by Senator Goldwater, would have required renewal of television station licenses if the Commission found that the applicant was qualified and that during the previous license term its program service "substantially" met community problems and "the operation of the station has been free of any serious violation of this act or the regulations promulgated thereunder."

An operator of a cable television system merits the same type of protection: if its operation under its franchise has been free of any serious violation of its terms, then the franchisee should be entitled to receive a reasonable renewal.

Therefore, the companies urge the Subcommittee to incorporate into the bill a provision which protects the legitimate renewal expectancy of incumbent CATV franchisees in franchise renewal proceedings and which limits city acquisition to instances involving default or willful and repeated serious franchise violations. Appropriate language to that end is suggested in the Appendix.

Buy-out provisions.—Although buy-out provisions in general share an inequitable disregard for franchisees' legitimate renewal expectations, some suffer even more serious defects. A number of existing franchises require municipal buy-outs to be at the system's book value only, and many other cities which are in the process of awarding franchises frequently seek to require book value buy-outs. Such provisions deter responsible and otherwise qualified companies from seeking CATV franchises, to the ultimate detriment of the public. They severely retard a system's ability to obtain financing, as lenders will not make the substantial capital commitment required for construction of a CATV system if the city has, in effect, a first lien on the system. This limits the pool of available potential bidders, a result particularly detrimental to small or minority-owned companies.

Additionally, book value buy-out requirements can inhibit a CATV system's incentive, particularly in the latter years of a franchise, to create a system which is not just the sum of its component parts but which provides a real service to its community. The uncertainty created by the possibility of a municipal takeover, despite the operator's efforts to satisfy the public, can discourage reinvestment in and upgrading of the system, particularly towards the end of the franchise term.

In other words, book value buy-out provisions simply compound the public injury of buy-out provisions in general, adding the service detriments described above to the substantial disadvantages of municipal ownership.

The companies do not believe that municipal buy-outs should be allowed in any circumstances except in the case of egregious, proven default. However, if such are allowed in certain circumstances, we believe the bill's provisions need amendment. Section 605(c) of the bill does represent a positive first step toward mitigating the problems associated with such provisions by at least requiring cities to buy out cable systems at their fair market value. The companies would urge, however, that this language be clarified to ensure that cable systems are valued at their fair market value as a going concern, computed in accordance with generally accepted accounting principles, such valuation to include goodwill and the worth of the franchise. Cities which seek to purchase CATV systems would then at least have to do so on the same basis as any other marketplace competitor and would not be able to claim the unfair bonanza of a book value purchase.

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[5] *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978).

Rate regulation.—A major and on-going area of tension between CATV systems and the local governments which regulate them is that involving rate regulation. Controversies arise over what services are subject to local regulatory authority as well as over rates' appropriate levels. Such controversies can be prolonged: although rate regulation procedures are intended to protect the public at large one or two individuals can abuse them, delaying final rate determinations for inordinate amounts of time. This, in turn, subjects the cable operator to unacceptable financial uncertainty while straining municipal resources.

A far better approach for all concerned—the cable operator, the city and most of all, the public—is to let rates be determined through the operation of the marketplace. Recent FCC decisions in both the broadcast and common carrier fields reflect an increasing recognition of and reliance on the efficacy of unfettered marketplace forces in achieving consumer-oriented goals of telecommunications policy. Market forces should have similar freedom to operate in the cable sector. Rates for subscriber and other services which are directly responsive to cost and consumer demand will achieve greater maximization of consumer welfare than rates arbitrarily established by local authorities.

Accordingly, the companies support provisions of the bill which would facilitate reliance on market forces, and specifically, Section 607, which would limit local rate regulation authority to rates for public, educational and government channels and for "basic service," and which would expressly forbid other types of local rate regulation. As Senator Goldwater has noted, "The bill provides that no entity may regulate leased channel rates. That means that no one shall regulate pay services or enhanced services."[6] The legislative history of S. 2172 should make this prohibition abundantly clear.

The companies are concerned, however, with the open-ended definition of "basic services" as "the retransmission of broadcast signals and any other service as determined by the cable operator." This definition is clearly—and properly—designed to give the cable operator full discretion to determine with precision those services which are to be subject to local rate authority. Given the political realities of many competitive bidding situations, however, it is likely that companies will be under considerable practical pressure to include as many services or tiers of service as possible in "basic service" and thus to submit them to local rate regulation, even though marketplace determination of rates would be more beneficial to consumers. Certainly, the testimony of local interests offered in connection with S. 2172 gives no indication of any voluntary intent to prefer market to regulatory forces for purposes of determining rates.

Accordingly, the companies urge that the definition of "basic service" be limited to the retransmission of local broadcasts signals so that rates for all other services (excepting public, educational and government channels) can be determined by market forces. The Appendix contains a suggested appropriate modification in Section 604(1), as well as a suggested definition of local television signal, based on that contained in the Copyright Act as it would be amended by H.R. 5949.

Further, to the extent that any local rate regulation is authorized, municipalities should be required to set rates at levels which will, at a minimum, compensate operators for the cost of providing the service. Cities should also be forbidden from unreasonably withholding approval of requests for rate increases. Rising costs are a fact of today's economic life. Some of these costs must of necessity be reflected in higher consumer costs. Refusing or arbitrarily delaying action on legitimate rate increase requests not only can divert municipal resources; it can deny cable operators revenues necessary to avoid reductions in service.

S. 2172, of course, does not require cities to engage in rate regulation. But political realities are such that most do, and do so to the greatest extent possible. That being the case, Section 607, particularly if modified as suggested herein, would be of enormous assistance in keeping rate regulation where it belongs for a nonessential service like cable—in the marketplace.

Franchise fee limitation.—As CATV has become more visible and available, local governments have increasingly come to look upon it as a potential municipal revenue generator. Franchise and other fees paid to cities by CATV systems can play an important role in municipal budgetary decisions. But CATV is a service industry, not a municipal funding mechanism.

The FCC, anticipating the detrimental impact of treating it as such, included in its 1972 CATV Rules a provision which limited most CATV Franchise fees to the reasonable level of 3 percent of gross subscriber revenues. Even though it subsequently abandoned its other standards for local CATV franchises, the FCC has retained this federal limit on CATV franchise fees, tangible recognition of the public interest importance of restrictions in this area.

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[6] Speech by Senator Barry Goldwater before the National Cable Television Association, May 4, 1982.

Section 611 of the bill would codify the Commission's authority over local franchise fees and direct it to impose "reasonable ceilings" on them. Such statutory endorsement of the FCC's franchise fee regulations is much needed: not only do excessive franchise fees divert revenues which would otherwise be available to improve services to the cable consumer, but the FCC's limits thereon have been successfully challenged in part due to the lack of specific statutory authority. (*City of Peoria* v. *General Electric Cablevision Corporation*, Case No. 81-1057 [C.D. Ill. January 12, 1982])

Although Section 611 thus makes an admirable start in dealing with the longstanding problem of appropriate limits on CATV franchise fees, it contains no proscriptions concerning grandfathered, excessive fees, application fees, payments in kind, prepayments of fees and similar matters. Many recent municipal REPs require the successful franchise applicant to "donate" expensive facilities or extensive funding for municipal projects and activities completely unrelated to cable and of no benefit to cable subscribers, Certainly, such requirements are unrelated to CATV's use of local streets and public rights of way, on which franchise fee obligations are premised.

Typical of such provisions is the requirement imposed by one large municipality that the cable franchisee computerize the card catalogues of all public libraries. In another community, the quid pro quo for obtaining the franchise included making channel and studio facilities available for a local "ecumenical" religious channel, to be administered by a particular church. Another example of unrelated consideration was required funding of college scholarships for local high school students for unspecified purposes. Such exactions can have just as pernicious an efffect on CATV systems' service capabilities as an outright 8 or 10 percent franchise fee. They simply have no place in the establishment of an interstate communications service.

Accordingly, the companies urge that in conjunction with adoption of Section 611, the Commission be directed to include in the fees for which "reasonable ceilings" are adopted all types of consideration and payments, direct or indirect (other than items of a nominal value or of reasonable cost and of benefit to all cable subscribers), paid by CATV systems to local governments. Other regulatory fees such as "inspection" and "recording" fees should be included in the total. Although such fees may be imposed by other businesses in the community, in almost all cases such "business" fees on CATV imposes an additional burden. The bill's legislative history should make clear that any CATV regulatory "franchise" fee is in lieu of all other fees. Further, existing fee arrangements which exceed these ceilings should be required to conform within a reasonable timeframe. Such limitations will contribute materially to ensuring the financial integrity of CATV systems and thus to maintaining the high quality of service enjoyed by CATV subscribers.

DEDICATION OF CHANNEL CAPACITY

The purpoose of Section 606 of the bill, which provides for the dedication, on systems with at least 20 channels, of a certain maximum portion of capacity for use by entities other than the system operator, appears virtually identical to the purpose of the FCC's former access rules. Specifically, capacity required for public, governmental, and educational access ("P/G/E acess") appears designed to optimize this medium as an outlet of local, community-oriented expression. Cf. Cable Television Report and Order, 36 F.C.C. 2d 143, 190–91 (1972) (hereinafter referred to as "1972 Report and Order."). The dedication of channels for lease ("commercial access") has two primary objectives: (1) to increase diversity of programming and services available to cable subscribers; and (2) to provide a media outlet particularly for local intities who cannot gain access to more established media. Id.

Because of very powerful economic incentives in the existing communications marketplace, however, cable companies will work toward these ends without governmental directive. To be successful, any cable television company must recognize and exploit the technology's ability to provide something different from what its competitors offer. When compared with other media, cable has two distinct advantages: diversity and specialization. Cable's multichannel capacity enables subscribers to receive a variety of programming and services from one source. And unlike other media with more limited channel capacity, cable systems need not gear their offerings toward mass appeal. Indeed, once a cable system has achieved a certain penetration level based on standard entertainment and informational fare, continued growth depends on adeptness at "narrowcasting," i.e., offering a variety of add-on services with specialized appeal.

In addition, most successful cable companies follow the sound business practice of community service. They would respond to local interest in and demand for local government programs, for programs produced by students of local colleages and high schools, and for the exchange of ideas by members of the public through call-in shows and community forums even if not required to do so by law or regulation. Similarly, if attractive programming and services are available from unaffiliated sources, a well-managed cable company would not hesitate to add these offerings to its service package.

Thus, if the marketplace is permitted to function freely, a provision such as Section 606 is not necessary to foster presentation of diverse or locally-oriented programming. If adopted, however, Section 606 should clearly state a maximum access channel obligation: additional channels could, and no doubt would, be made available to respond to actual demands therefor, but this should be voluntary with the cable system, not forced on it by the government.

Section 606 is correct in its effort to match dedicated capacity to actual demand. Specifically, Section 606(d) is one of the provision's strong points in that it does not require such channels to be "dedicated," i.e., it permits capacity to be used for other programming until channel time is requested for one of the intended purposes. By contrast, the FCC's 1972 access rules did not allow mandatory dedicated channels to be used for any other purposes. As a result, almost all such "access" channels remained totally dark, a waste of a valuable resource caused by unsound agency policy which significantly reduced the overall level of subscriber service. In addition, because subscribers became so accustomed to the channels being dark, the few access programs that were aired had virtually no audience. This experience persuaded the FCC to revise its rules to permit all access use to be consolidated on the same channel until sufficient demand developed for more space and to allow other programming to occupy unused access channel time in the interim. See Report and Order, Docket No. 20508, 59 F.C.C. 2d 294, 314 (1976).

The Supreme Court's invalidation of the FCC's access rules in 1978 removed the federal presence from access regulation.[7] Many municipalities, particularly the larger urban ones, rushed in to fill the perceived regulatory vacuum, often with ill-conceived and wasteful access requirements dictated by access "coalitions" and other nonelected groups, supported in many cases by federal funding. Unimpressed by the waste inherent in exclusive dedication of capacity without regard to actual demand, officials responsible for drawing up cable RFPs in many major cities have required systems to make available for immediate use as many as 20 access channels, with studio facilities far more elaborate than local residents desire or are capable of using. The adverse economic results of forced investments of such great magnitude in unnecessary capacity and facilities will begin to be felt as these systems commerce operation, providing, unfortunately, proof of the wisdom of a federal preemption of access from local regulation.

Notwithstanding the beneficial aims of Section 606's maximum access channel provisions, as presently drafted, the section may actually function in a self-defeating manner. Its goal of fostering program diversity may, for example, be thwarted because the calculations upon which channel availability are premised use as their basis a cable system's entire theoretical channel capacity. Theoretical capacity, however, can differ dramatically from actual capacity, as interference on the same or adjacent channels can render a substantial portion of system capacity unusable. Moreover, the cable operator's discretion with respect to use of his channels is circumscribed by other requirements, principally the Commission's "must-carry" rules. In some areas of the country, in fact, there are so many "must-carry" signals that so-called "saturated systems" can offer their subscribers little besides off-air television signals, a clear negation of CATV's potential contribution to available program diversity.

The same situation could obtain under Section 606 as presently drafted unless it is revised so that access obligations are triggered only by the actual practical availability of channels subject to the cable operator's discretion, that is, channels which are technically reusable and not subject to other mandatory usage requirements. Appropriate language to this end is suggested in the Appendix hereto.

More serious problems with Section 606 stem from its mistaken reliance on a "first-come, first-served" approach toward allocation of channel time and its lack of an express provision enabling operators to take reasonable precautions to protect their considerable investments from abuse. To the extent the Bill seeks to incorporate concepts previously found in FCC regulations, the history of access from 1972 on is instructive.

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[7] *United Video* v. *Midwest Video,* 440 U.S. 689 (1978). The FCC had formerly preempted local access regulation that was inconsistent with the Federal scheme. 1972 Report and Order, supra, at 13.

The FCC's 1972 access rules adopted a "first-come, first-served" method of allocating channel capacity among eligible users. Although the superficial fairness of the approach gives it simplistic appeal, examination of how it worked in practice reveals that it often substantially hindered rather than advanced important access goals.[8]

Even at the outset, the Commission recongized a major flaw: conceivably, the user who came first could tie up all capacity (or large blocks of it) and foreclose other significant uses of the system. Such a situation would destroy sought-after diversity. To keep this from happening, the Commission's commercial access regulations required at least one channel to be available for part-time users. 1972 Report and Order, supra, at 192.

In applying the rule, the Commission held that "first-come, first-served" meant that no preference could be given to local users. See RVS Cablevision Corp., 36 R.R.2d 1133 (Cable TV Bur., 1976). Thus, by being first a nationally-based company with no special local ties could easily prempt full-time capacity from the very type of occasional and varied, part-time local expression the requirement was designed to serve. In fact, during the era of FCC access, at leat one company made several hundred blanket requests for commercial access to entire cable channels on major cable systems across the country and vigorously fought for this privilege, using the antitrust laws as a threat. Under Section 606(e), the system operator would have no alternative but to honor such a first request, regardless of the consequences.

In another significant access decision, the Commission ruled that the operator was not required to guarantee a regular daily or weekly block of time to any particular use. See Teleprompter of Worcester, Inc., 67 F.C.C.2d 643 (1978). The logical extension of that ruling is that under a strict reading of "first-come, first-served," an operator would not be permitted to commit such capacity to any particular user.

A programmer might, for example, plan a series for a certain time on successive Tuesday evenings. The importance of regular scheduling to viewership is well-documented in the annals of broadcast television, with a great premium being placed on certain item slots, line-ups, lead-in phenomena, and the like. If another user has already tied up part of the desired time, the implementation of the secong user's programming plans would be impossible. Obviously, responsible entities seeking to make major investments in high quality cable programming in a community may be discouraged from doing so if the availability of coherent blocks of time is destroyed by a pure, first-come, first-served approach that leaves the system owner no discretion to reserve different sorts of time groupings necessary to encourage truly diverse program offerings.

Nor is there any assurance that those first in line will provide services that consumers really need or want. Thus, commercial access capacity could easily be consumed with unattractive, duplicative, or—even worse—patently offensive programming instead of the variety of appealing services that the Subcommittee obviously envisions. There were instances of the latter under the FCC's earlier rules. Furthermore, a rapid succession of failures is certain to undermine consumer confidence in other services the system has to offer. Only the system operator has the motivation and the expertise to keep this from happening.

Finally, in attempting to apply the first-come, first-served rule to actual situations, the Commission was continually confronted with many difficult questions which it sometimes simply could not resolve. The Commission was often asked, for instance, to what extent a user's qualifications or the nature of the use could be considered in determining which of several users was actually "first." In one case, the "first" programmer, whose offering consisted primarily of a character-generator repeating one or two messages over and over for hours on end, sought to tie up an entire channel to the detriment of other users who could present more attractive programming. On several other occasions, the Commission faced the question of whether a user first in time had to be guaranteed access at whatever hour of the day requested.[9] In the area of educational access, the Commission had to referee disputes over priority between accredited and nonaccredited schools. Memorandum Opinion and Order, Docket No. 20018, et al. 49 F.C.C. 2d 1078 (1974). Numerous informal FCC staff rulings and interpretations inhibited operators from making reasonable inquiry as to the legal character and financial qualifications of persons seeking to utilize expensive facilities and deliver their "message" to the system's subscribers. This terrible experience can simply not be allowed to be repeated.

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[8] Although most of the examples discussed below relate to commercial access, they have some relevance to P/G/E access as well.

[9] On this question, the Commission ruled in the negative, but suggested that requests must be honored for more than the standard business day. See Teleprompter of Worcester, Inc., supra.

In order to avoid the difficulties which experience teaches will inevitably arise if a "first-come, first-served" provision is enacted—who, for example, will decide who came first—the companies suggest as an alternative a provision which would simply require that access be accorded on a nondiscriminatory basis to entities having no affiliation with the cable system operator. (Suggested modifications to Section 606 are included in the Appendix.) The underlying purpose of "first-come, first-served" provisions is to prevent cable operators from arbitrarily limiting access to affiliated entities, thereby foreclosing access desired by nonaffiliated groups. The proposed modifications would serve this purpose by ensuring access by nonaffiliated entities, without, however, all of the drawbacks and potential for confusion of first-come, first-served provisions.

After operational experience under "hands off" requirements for CATV systems vis-a-vis access programmers, the Commission finally recognized that system operators had both a right and, sometimes even an obligation,[10] to protect their investments against abuse by irresponsible or unqualified users. Persuaded by actual instances of damage to systems or harm to the consumer, the Commission ruled that cable system operators could: (1) require users whose activities involved system equipment to provide damage deposits or to post bonds, Teleprompter of Worcester, supra, and 62 F.C.C. 2d 399, 404, n. 13 (1977); (2) require programmers to submit evidence of having obtained copyright clearance before using the channel, Cablevision, 44 RR.2d 537 (Cable TV Bur., 1978);[11] (3) require all materials (films, tapes, etc.) submitted for presentation on an access channel to be compatible with system equipment, Gill Cable, 66 F.C.C. 2d 517 (1977); (4) restrict use to presentation of nonlive, prerecorded material, Cablevision and Teleprompter of Worcester, Inc., supra; and (5) limit use to certain parts of the day (i.e., not required on a 24-hour basis), Teleprompter of Worcester, Inc., supra.

Apart from the obvious possibility of physical harm to the system itself, irresponsible or unqualified users can damage intangible but equally valuable business assets such as subscriber relations and local goodwill. Inevitably, subscribers hold the system operator responsible for poor service coming in over the cable system, regardless of whether it is provided by a commercial access user. Thus, it was Manhattan Cable—not the access channel user—that was deluged with irate phone calls when offensive activities appeared on the system's access channel. Similarly, a number of systems that made channels available on a leased basis to one particular early pay-cable programer during the 1960's and 70's had to deal with subscriber inquiries and complaints when outages, signal deterioration, broken equipment, and billing errors were the fault of the lessee providing the pay service.

In order to avoid this result, S. 2172 should at a minimum be revised to ensure the cable operator adequate control over those who use his property. The FCC, for example, imposes stringent standards upon those who become its licensees. Cable operators should have the same right to establish some minimum qualifications for access users, such as, for example, demonstrating good character (e.g., no criminal convictions). The Appendix contains a proposed revision to Section 606(c) which would accomplish this.

If the bill is to retain a requirement for dedication of capacity, the companies urge retention of its present provisions which match capacity to actual use and which preempt the imposition of unreasonable requirements at the state and local levels; requirements of S. 2172 should clearly be designated as maximum, not minimum requirements. In addition, the companies urge that access obligations be based on actually available channel capacity and that a strict "first-come, first-served" approach be replaced by a "nonaffiliated entity" requirement. At a minimum, S. 2172 must include a provision which grants the operator authority to take reasonable measures to maximize use of the channels and to protect his investment against abuse: the legislative history of S. 2172 as finally reported should contain specific recognition of the rights and obligations of the system owner to adopt reasonable standards to achieve such goals.

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[10] Pursuant to FCC regulation, the operator retains ultimate responsibility for insuring that the system complies with technical requirements. In addition, the operator was at one time held responsible for insuring that no programing, including that presented by access users, violated FCC rules on obscenity, lotteries, etc, Clarification of section 76.256 of the Commission's rules and regulations, 59 F.C.C. 2d 984 (1976).

[11] Under Section 608 of the bill, cable operators would be immune from content-related liability for programing of their channel users. Nevertheless, they would remain susceptible to litigation and could be forced to bear the cost of defense until any claim against them could be dismissed.

OWNERSHIP MATTERS

The companies believe that S. 2172 represents a step in the right direction toward a viable statutory policy for CATV ownership. They submit, however, that certain further modifications in the bill necessary in order to ensure an environment in which cable technology and services can flourish to the benefit of the consuming public.

Municipal ownership. The companies strongly urge that S. 2172 be modified to incorporate a complete prohibition on municipal ownership of CATV systems. Such a provision (whose suggested terms are set forth in the Appendix) would benefit both the taxpaying public and the public interest in effective and responsive cable television service. Cable television is an immensely complex, sophisticated and ever-changing technological industry which requires not only continuing technical expertise but extensive financial and personnel resources on performing their primary governmental functions and should not be lured by CATV's exciting potential into a morass of insuperable operational difficulties.

To start with, construction of a cable television system, even a relatively modest one, requires a substantial initial capital investment on which there is likely to be no return for many years. Cities, which have limited financial resources in any event, may be unable to raise sufficient amounts of capital, particularly in these times of heightened demands on local government coffers.

The investment required is not only large, it is risky. Technological development can mandate replacement of relatively new but obsolete equipment. Such developments can also result in the creation of new competitive services, thereby decreasing the potential CATV customer pool. CATV does not enjoy a guaranteed market. It must compete with services provided by over-the-air broadcasting, newspapers, books and movies theaters, not to mention new types of information distribution systems such as MDS, DBS, LPTV, and home video services. Even if a CATV system should become profitable, there is no guarantee that it will remain so.

Assuming financial hurdles can be overcome, other intangible but nonetheless significant difficulties remain. Cable television systems are sophisticated, intricate modern businesses. From just a technical and safety standpoint, successful operation of even a small system requires highly skilled engineering personnel capable of dealing with sophisticated electronic equipment; and if two-way capability is provided, the expertise required increases. Expertise is also needed for marketing, programing and even such routine functions as filing FCC and copyright reports.

In short, a staff, skilled in a wide range of fields, is necessary to a modern CATV system's success—and to ensuring high quality service. Municipalities whose primary responsibilities and expertise lie elsewhere, have neither the resources nor the incentive to meet these demands in as effective a manner as the private sector. Running a CATV system is not an auxiliary responsibility which can be tacked on to those of a city department. It involves major commitments. In fact, in many situations, the only way a municipality will be able to meet those commitments may be to subcontract operation of the system to a private company. But that eliminates the very advantages sought to be achieved by public ownership.

Even ardent advocates of public CATV ownership concede that special protection of First Amendment freedom is necessary. S. 2172 seeks to provide such safeguards by prohibiting government programing censorship on public systems. But censorship can be more subtle than the blue pencil. Seemingly neutral practices such as scheduling, controlling equipment availability or directing funding can be equally as effective in favoring the position espoused by the political party in control of City Hall. The legislation does not, nor, as a practical matter, could it, address these concerns.

Moreover, structural means of insulating programming from city control are almost inevitably ineffective. Separate corporations, for example, create a labyrinth whose cost and inefficiency may far outweigh any benefits. Similarly, "independent" citizens' access and programming boards may not in fact act independently, and their effectiveness is in any event limited by the quality of the appointees, their dedication, and the strength of the government's commitment to provide them with the resources to carry out their duties in a truly independent fashion.

Permitting public ownership where private ownership is possible may not benefit anyone, least of all the municipalities and their citizens. Even where a municipality has sufficient resources to construct or acquire a cable system, it frequently will not have the ability and expertise to operate it in a way which will serve the public.

When consideration is also given to the need to protect the public's First Amendment interests from abuse, it is clear that Congress should adopt an outright prohibition on initial public ownership and operation of cable television systems if private ownership is an available option.

Should Congress fail to adopt such a proscription, it should at a minimum forbid the use of revenues raised by tax-free municipal bonds for the acquisition, construction or operation of a cable television system. A municipality's use of such revenues to engage in a private business venture effects an unfair burden on those local citizens who cannot enjoy the fruits of the venture. Particularly given the enormous initial costs of CATV system construction and operation, use of tax-free municipal bond revenues to underwrite city CATV participation forces non-subscribers to subsidize the cost of providing services they either do not want or cannot afford. Revenues generated by tax-free bonds are far more appropriately used for facilities more essential than CATV systems.

Further, when cities become CATV system operators through the use of such revenues, they enter the marketplace on an artificial basis: they are not required to bear the true economic costs of competitive participation, causing distortion in the value and cost of services rendered. If cities are to become participants in the CATV marketplace—and the companies emphatically urge that this not be allowed to occur—then at least they should be required to participate on the same basis as any other private entrepreneurs. The requested restriction on the use of municipal bond revenues will force cities to assess the true cost of CATV system operation before they commit to it, a result clearly beneficial to taxpayers and subscribers alike.[12]

In sum, the companies submit that municipal CATV ownership carries with it no actual public interest benefits but instead substantial disadvantages for both subscribers and nonsubscribers and urge the Congress to prohibit such ownership. Should the Congress decline to do so, however, it should at a minimum require municipal participation to reflect its true economic cost by prohibiting the use of revenues from tax-free municipal bonds to fund city CATV ownership.

Foreign CATV ownership.—Although Section 605(b) recognizes the existence of the growing, significant problem of an increasing foreign presence in the United States cable television industry, and begins to address it, the companies submit that its strictures are an insufficient remedy. Section 605(b) merely permits the Commission to adopt regulations requiring reciprocity with respect to foreign CATV ownership; it does not demand that the FCC do so. Such a mandatory requirement should, however, be imposed.[13]

Thus, the presence of foreign interests is increasingly being felt in the cable television industry, as such groups find CATV an attractive vehicle for investment and operation. At the same time, domestic cable television companies which seek to develop their expertise abroad can encounter substantial barriers to their involvement and investment and often are excluded from any market participation at all.

Further, when foreign investors become involved without limitation in a communications medium of significant potential and public impact, this not only runs contrary to the frequently-expressed concern for local responsiveness, but, more significantly, it deprives domestic capital and interests of the opportunity for investment and growth in a vital communications industry. When domestic capital is thwarted both at home and abroad, Congressional relief is clearly required. Indeed, Section 310(b) of the Communications Act of 1934, as amended, already limits foreign ownership of broadcast licensees. Its underlying principles should be applied in the context of CATV investment as well.

It should be stressed that the company's position on this point is not merely the product of xenophobic motivations: they do not urge that all foreign CATV ownership be prohibited. But they do urge that policies respecting foreign CATV investors mirror those applicable to United States CATV investors in other countries. Such a result is no more than equity and basic fairness demand.

Moreover, the companies do not seek divestiture of existing foreign CATV interests. Grandfathering of these interests would avoid industrywide disruption and would ensure continuity of service to subscribers. A prospective requirement of reciprocal foreign ownership policies should, however, be adopted. Suggested statutory language to that effect is included in the Appendix.

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[12] The companies recognize that consideration of this aspect may fall within the jurisdiction of the Senate Finance Committee. This should not, however, in our view, preclude its serious review in the context of S. 2172.

[13] For recent examples of nonequitable foreign treatment of U.S. communications, note the recent activity of the Canadian government in restricting the carriage of U.S. FM radio stations on Canadian CATV systems. Broadcasting May 17, 1982, p. 54.

In sum, the companies do not seek to erect barriers to foreign CATV investment in the domestic U.S. market. They do, however, insist that avenues for foreign investments be two-way streets. The equal access which the companies seek is consistent with equity: it has as its ultimate end the expansion of international commerce by creating the incentive to remove impediments to is accomplishment.

Local telco cross-ownership—Local telephone companies enjoy a monopoly position with respect to an in-place communications delivery system. Cable systems' recorded past experience with telephone companies demonstrates that the telcos do not hestiate to exploit this monopoly position to impede the introduction of new competitive service in their own market areas. Many telcos have not hesitated to use their ownership and control of pole and conduit systems, which cable systems must use for their distribution systems, to extract exorbitant lease fees or to delay institution of cable service. Absent a CATV—telco cross-owneership restriction, ownership of these pole systems would give local telcos a decided competitive advantage over independent cable companies bidding against telcos for cable franchises.

The FCC has dealt with such real and potential abuses through its rules prohibiting local telephone company ownership of colocated cable television systems. Section 605(d) and (e) of the Bill would lend specific statutory support to these prohibitions and to the extent that the bill seeks to enact current Commission rules and policies without any relaxation thereof, the companies support it. Open entry policies are generally to be preferred, but certain judicious exceptions thereto are necessary to protect the public's interest in high quality and innovative service. One such exception involves local telco ownership of CATV systems.

Because telephone companies already own a substantial distribution system, their additional control over what might be the only alternative, the local CATV system, could seriously limit, if not eliminate, competition in the provision of local loop service. And because most of these services are still being developed, foreclosing competition could prevent their ever emerging as viable communications vehicles.

Moreover, to premit telco ownership of a local cable system is to invite cross-subsidization: no matter what protections against the practice are imposed, there can be no guarantee of their effectiveness. And to the extent cross-subsidization exists, the goal of a truly cost-based telephone service will never be reached.

Such considerations, coupled with the possibility of anticompetitive abuses, have consistently compelled the Commission's conclusion that the public interest requires a general prohibition on CATV-telco cross-ownership. And, despite the protests of the telephone companies, the courts have supported that conclusion.[14] More recently, as part of its exhaustive inquiry into cable ownership matters, the FCC's staff concluded that continuation of a CATV-telco cross-ownership ban was necessary.[15] In fact, the Staff Report deviated from its otherwise firm support for open CATV ownership policies in making that recommendation, emphasizing the significance of the need for telco ownership restrictions.

With the adoption of Sections 605 (d) and (e), the Commission would be given welcome statutory tools and guidance enabling its continued protection of the public interest through restriction of telephone company ownership of CATV systems.

The companies would note, however, that the current language of those provisions encompasses cross-ownership not just by telcos, but by all telecommunications carriers, whether or not they are regulated, unregulated or exchange carriers. These restrictions are thus broader than necessary, and the companies therefore suggest that the bill's language be revised so that its prohibitions apply not only to regulated exchange carriers.

Utility ownership.—As discussed above, telephone companies have in the past exploited their monopoly positions to thwart the introduction of competitive CATV communications services. Similar anticompetitive abuses accompany utility company entry into the CATV marketplace. A review of complaints filed against utility companies under the Commission's pole attachment program reveals that many are just as guilty as telcos of delaying cable service or of imposing unjustifiably high fees or engaging in other unfair practices with respect to cable use of their poles. S. 2172 does not currently restrict ownership of CATV systems by monopoly utility companies, even though such companies are to an increasing extent making their presence felt as an anticompetitive force within the industry.

Accordingly, the companies urge the Subcommittee to add a provision to Section 605 which would prohibit local utility company ownership of CATV systems. Alternatively, provision should be made for FCC investigation of utility company practices in this area, and authorization given for imposition of any ownership restrictions which the FCC may, in its discretion, deem necessary or appropriate.

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[14] See General Telephone Co. of the *Southwest* v. *United States*, 449 F.2d 846 (5th Cir. 1971).

[15] FCC Staff Report, "FCC Policy on Cable Ownership" (November 1981).

OTHER MATTERS

The role of the FCC.—As the agency designated by Congress to oversee interstate communications regulation, the FCC has developed a high degree of expertise. The bill properly seeks to utilize this expertise for the formulation of rules to implement its provisions with respect to CATV, clearly an interstate communications service. The companies agree that the FCC must therefore continue to be involved in areas such as franchise fees (Section 611; see discussion above); technical standards and compatibility (Section 613); and record-keeping (Section 614) and support the bill's provisions in that regard. The Commission might also, however, play a beneficial role in promulgating and administering regulations designed to implement the subscriber privacy provisions of Section 612. In all of these areas, a continuing federal presence is necessary to ensure consistent attainment of the national policy objectives reflected in the bill.

A number of entities which have testified before this Subcommittee, however, have sought restriction of the federal role and its usurpation by local regulatory authorities. Such a result would be inappropriate and clearly contrary to CATV's role in interstate commerce. Local authorities premise their characterization of CATV as an intrastate business on the physical facts of facility location within a particular place and its local service capabilities and consequent need to be responsive to local interests. But the physical facilities of broadcast stations are located in one place; and broadcast licensees are obligated to be responsive to local community problems, needs and interests. Yet no one can gainsay their interstate character. Like broadcasters, CATV systems play a vital role in the nationwide, interstate communications structure: they transmit interstate communications and the fact that some services may have some intrastate characteristics does not and should not be deemed to alter the overall interstate nature of the medium.

Accordingly, the proper place for primary regulatory authority over CATV is with the FCC. A uniform nationwide policy in the areas where the bill grants the FCC jurisdiction is thus fully appropriate: it will avoid a patchwork pattern of inconsistent local regulation whose impact on CATV's future role can only be detrimental.

Program content.—The companies support the bill's provision which relieves cable operators from legal liability resulting from use of channels or presentation of programming by others (Section 608). Any other result would be totally inequitable and would subject CATV operators to costly litigation, which would ultimately be to the detriment of cable consumers.

The companies also support the bill's provision exempting CATV from the Fairness Doctrine and other broadcast programming requirements (Section 609). Cable is different from broadcasting, in terms of services capable of being provided and technical characteristics. It is inappropriate to subject it to regulations premised on broadcasting's characteristics, and Section 609 accurately recognizes that fact.

Signal piracy.—The companies strongly support adoption of Section 705, as amended. Signal piracy can have a devastating impact on a cable system, both in terms of lost revenues and in the quality of service received by honest persons who are regular CATV subscribers. A number of states have recognized this fact and have addressed the problem in local regulation. The bill would provide the CATV industry with long-needed federal protection against theft of cable services in clear and precise terms.

Common carrier exclusion.—The companies support section 604(15)'s exclusion of a person providing cable service from carrier status. However, they would urge that this provision be modified slightly to expressly state that any of a CATV operator's activities should not be deemed to involve common carrier operations subject to Title II of the act. Such clarification would pave the way for development of CATV's technological potential unimpaired by the threat or actuality of intrusive, counterproductive public utility-type regulation.

CONCLUSION

The companies wholeheartedly support the basic thrust of S. 2172, particularly its allocation of regulatory responsibility among various levels of government. The changes suggested herein would, it is submitted, simply improve what is already good and desirable legislation. The companies enthusiastically support its prompt adoption as changed in these particulars. Such action would facilitate development of a nationwide CATV industry capable of rendering the quality and variety of cable television service which the American public demands and deserves.

SPECIFIC SUGGESTED MODIFICATIONS IN THE LANGUAGE OF S. 2172

ALLOCATION OF REGULATORY AUTHORITY

Section 603 should be revised to read as follows:

"Section 603. The provisions of this title shall apply as follows:

(1) The Commission shall have jurisdiction and exercise authority with respect to cable systems [solely] as specified in this title. Commission jurisdiction under this title is exclusive and no other Federal or State instrumentality or agency or political subdivision thereof shall make or establish rules or policies regarding *any of* the matters dealt with in this title, *unless this title specifically authorizes the making of such rules or policies by such instrumentality, agency or political subdivision thereof.*

(2) Any cable system shall be subject to the provisions of this title and such orders, rules, or regulations as may be adopted pursuant thereto and any Federal *or non-Federal* rule, regulation, order or standard applicable to cable systems shall, to the extent inconsistent with the provisions of this title, be null and void.

(3) A state, instrumentality, agency, board, commission, or authority or any political subdivision thereof may adopt or continue in force any law, rule, regulation, order, or standard affecting cable systems *which is not forbidden to any governmental authority under this title* unless such law, rule, regulation, order or standard deals with matters subject to the exclusive jurisdiction of the Commission [*and or is not forbidden to any governmental authority under this title*].

RENEWAL EXPECTANCY

Section 605(c) should be revised as follows: . . . a State or any political subdivision or agency thereof may not own or acquire an ownership interest in any cable system, unless such State, subdivision, or agency acquires such ownership or interest at not less than fair market value *as a going concern, (computed in accordance with generally accepted accounting principles),* and not by condition of franchise unless the franchise provides for *such acquisition, does so only in the event of substantial and serious violation of the terms and conditions of the franchise, and requires such acquisition to be at fair market value as a going concern.*

(c)(2). No state or any political subdivision or agency thereof shall fail to renew a franchise authorizing provision of cable television service at the end of the franchise's initial franchise term (or of any renewal term thereof) if the franchisee's operation of the cable system has been free of any serious violations of the terms of the franchise, or of default thereof.

"BASIC SERVICE"

Revise Section 604(a) as follows: "Basic service," "basic cable service," or "basic subscriber service" means the retransmission of local radio and television broadcast signals. [*and any other service as determined by a cable operator*]

Add a new definition of "local television signal": *A television broadcast signal is considered to be local within the area in which the station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations and authorizations of the Commission in effect on April 15, 1976.*

"MUNICIPAL OWNERSHIP"

Revise Section 605(c) as follows: Notwithstanding the provisions of Subsection (a) of this section, *no State or any political subdivision or agency thereof may own or acquire an ownership interest in any cable system.*

"DEDICATION OF CHANNEL CAPACITY"

Revise Section 606(a) as follows:

Section 606(a). The Commission shall require cable systems having twenty or more television broadcast channels (120 MHz or more of bandwidth) *actually and technically available* for immediate or potential *discretionary* use *by the cable operator and not subject to other use requirements imposed by the Commission or a state or political subdivision or agency thereof,* to dedicate or set aside . . .

Further, revise Section (c) as follows:

(c). The channels referred to in paragraphs (1) and (2) of subsection (a) of this section shall *not* be made available [on a first-come, first-served, nondiscriminatory basis] to the cable system operator or any entity having an ownership affiliation with the cable system operator.

Alternatively, revise Section (c) as follows: *The cable system operator shall have the sole and exclusive authority to prescribe the terms and conditions of access to the channels referred to in paragraphs (1) and (2) of subsection (a) of this section, provided, however, that such channels shall be made available on a first-come, first-served nondiscriminatory basis and that such terms and conditions shall be reasonable. No State or political subdivision or agency thereof, or cable franchising authority shall have any control or other power of censorship over the programming presented over the public, educational, and leased channels referred to in paragraphs (1) and (2) of subsection (a) of this section, nor shall it have any authority to require provision of any channels in addition to those required by paragraphs (1) and (2) of subsection (a) of this section.*

"FOREIGN OWNERSHIP"

Revise Section 605(b) as follows:

Section 605(b)(1). . . . the Commission shall [have the authority to] conduct inquiries and establish policies, rules, regulations, and requirements applicable to foreign persons . . .

Section 605(b)(3). *Within the 180-day period following the date of enactment of this subsection (b),* the Commission shall adopt such rules, regulations, policies, requirements and procedures and shall impose such restrictions as it determines to be necessary or appropriate to carry out the provisions of this subsection, *provided, however, that such restrictions shall not require divestiture of interests in United States cable enterprises held by foreign persons on the effective date of its enactment.*

"TELECOMMUNICATIONS CARRIER"

Revise Section 604(15) as follows:

(15) "telecommunications carrier," or "carrier" means any person, including any government or quasi-government entity, which offers any telecommuncations service or facilities used by any person to provide telecommunications services, except that a person engaged in broadcasting, or in providing any cable service, *or a cable operator,* shall not, insofar as such person *or a cable operator,* is so engaged, be deemed a carrier *or a common carrier subject to the provisions of Title II of this Act.*

SUPPLEMENT STATEMENT

The companies' original statement addressed the issue of dedicated channel capacity as required by § 606 of the bill. Taking the position that the mandatory dedication of a certain percentage of cable systems' capacity is unnecessary to the achievement of the bill's objectives, the companies also pointed out that such a requirement, if included, should apply only to those system channels that are technically reusable and not subject to mandatory usage requirements. The purpose of this supplement is to elaborate upon the technical causes of channel unavailability.

The prevailing technical problem that causes systems with 20 or more channel capacity (i.e., converterized systems) to lose the use of channels is the co-occupancy of the midband (108-136 MHz) and superband (225-400 MHz) by cable systems and certain air navigation users. Because of a potential for interference between cable systems and air navigation services within the same geographic area, FCC regulations currently restrict use of these frequencies by cable systems. Specifically, at power levels of 10^{-5} watts or 28.75 dBmv or greater, a cable system generally will not be permitted to use a frequency in these bands when it conflicts with a local air navigation service.

Because signal quality on a channel may not be acceptable at levels below 28.75 dBmv, it is not always possible for a system to resolve the conflict and regain use of the channel by simply reducing power. Nor is it always possible to avoid conflicts by offsetting to a slightly different frequency within the same channel. Because use of the frequency bands in question is heaviest in urban areas where larger capacity cable systems are operating or being built, such systems are most likely to experience channel loss.

Furthermore, many of the cable systems now being built are employing the harmonically related carrier ("HRC") mode of operation, which relies on harmonic frequency principles to produce clearer pictures. On HRC systems, frequency conflicts are even more difficult to resolve because it is not possible to offset frequencies on just one channel without losing the significant advantages that expensive HRC equipment is designed to produce. Thus, the entire column of frequencies used by the system (i.e., all channels) must be shifted in order to preserve the harmonic properties needed to insure the desired picture quality.

In areas of heavy frequency usage, a shift of all the frequencies might resolve the initial conflict and restore the use of one channel but could just as easily result in conflicts involving other frequencies. Thus, in attempting to recover use of one channel, a 54-channel HRC system that must offset all 108 frequencies to do so may lose the use of at least another channel in the process.

The companies therefore respectfully submit that such unusable channels should not be considered a part of system capacity for purposes of applying the dedication requirements, assuming, of course, that such requirements are adopted.

STATEMENT OF JOE H. FLOYD, MIDCONTINENT BROADCASTING CO.

Mr. Chairman, Members of the Subcommittee, my name is Joe H. Floyd, and I am vice president of Midcontinent Broadcasting Co. which, through its wholly-owned subsidiary, Midcontinent Cable Systems Co., owns and operates 14 cable television systems serving 28,000 subscribers in South Dakota, North Dakota and Nebraska.[1] I have been actively involved in the cable television industry since the late 1960's and have served as President of the South Dakota and North Central[2] CATV Associations as well as on the Board of Directors of the National Cable Television Association.

Midcontinent Broadcasting Co. and I are grateful for the opportunity to submit for the record a written statement addressing Senate Bill 2172 from the perspective of cable television operators in South Dakota and other midwestern states. Before proceeding with my comments on the general approach taken by the bill and on specific provisions, I wish to commend the subcommittee and its staff on the tremendous effort that obviously went into the formulation of legislation that deals with extremely difficult issues in such a concise and insightful way. The Bill reflects a considerable mastery of a complex, constantly changing, and highly technical subject. Clearly, it took a great deal of hard work to achieve this.

THE NEED FOR A FEDERAL LEGISLATIVE FRAMEWORK

The crucial need for federal legislation that deals specifically with cable television is abundantly evident from a regulatory history fraught with constant change, inconsistency, and uncertainty for cable operators and regulators alike. As the technical sophistication and range of services offered by our industry has increased, so does the need for a coherent regulatory framework. Past experience demonstrates that this regulatory ideal is unattainable without some very clear guidance from Congress.

Although a typical CATV operation in a small town in South Dakota is quite different from the total communications system that may soon be doing your grocery shopping, monitoring your energy use, and playing "Pac Man" with your children if you happen to live in a major urban area, it is just as vitally important a component of the interstate communications system in that it brings South Dakota residents programming and information originating from New York, Atlanta, Chicago, and even the halls of Congress in Washington, as well as essential network programs. The continued existence and development of the cable system as an effective interstate communications link absolutely requires regulation that, when necessary, places national and regional priorities above state and local ones. The cable industry can only continue to serve national communications objectives if Congress prohibits other levels of government from engaging in regulatory activities that impede interstate communications and gives the FCC a clear-cut role in areas where it's expertise and national perspective will be beneficial.

By the same token, the typical cable system in South Dakota serves a community with needs that are unique or at least very different from cable systems in other areas of the country or, perhaps, even from the cable system in a neighboring South Dakota community. Obviously, certain aspects of cable operations that need to be regulated are better dealt with at the local level. in the past, however, there has been some uncertainty and, hence, more than a little conflict as to what should be regulated by whom. As a result, in complying with one set of government requirements, some cable systems have even been forced out of compliance with others.

In our view, the bill's approach toward regulatory jurisdiction should reduce much of the existing confusion; it clearly outlines the respective regulatory roles of each level of government and avoids the pitfalls of duplicative or inconsistent regulation.

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[1] Additionally, Midcontinent jointly owns and operates 8 CATV systems serving another 28,000 subscribers. We also jointly own and operate systems in Montana, Wisconsin, and Florida.

[2] Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin.

COMMENTS ON SPECIFIC PROVISIONS

Of the issues addressed in the bill, our company, like most South Dakota cable operators, is principally concerned with cable system ownership and rate regulations. Accordingly, the remainder of this statement will focus upon those areas and will comment very briefly on the other provisions.

I. OWNERSHIP

Municipal Ownership.—There are currently 52 cable television systems in South Dakota serving 55 different communities.[3] Several of these systems are owned by nationally-based multiple system operators, but the great majority are locally-owned by dozens of individual small businesses or by regionally-based companies like Midcontinent. Until recently, South Dakota municipalities have not had much interest in owning or operating their own cable systems. In fact, our state law prohibits them from doing so. Perhaps because we are a very fiscally conservative state, and taxpayers are less willing to fund municipal government, one South Dakota city began looking at cable television operation as a good way to fill its municipal coffers, even though a number of private companies were interested in providing service. Last January, a bill was introduced before the South Dakota legislature aimed at lifting the ban on municipal cable ownership. Our State Association vigorously and, for the most part,[4] successfully opposed that bill. For the same reasons, we strongly support the provision in S. 2172 that prohibits state or municipal acquisition of a cable system at less than fair market value and prohibits government control of program content. We urge the subcommittee to go even further by restructing such municipal acquisition to those situations where the franchisee has defaulted and by prohibiting initial municipal ownership unless there is no alternative source of cable television service in a particular community.

As it stands, Section 605(c) will at least further the public's interest in the healthy development of cable television service and the preservation of First Amendment free expression by ensuring that municipal officials who now have the mistaken impression that cable TV is a "money machine" will also have the opportunity to experience what it takes financially to become a system owner before they jump into the business. Because the costs of public ownership—not just to the public but to the municipalities themselves—so far outweigh the benefits, this restriction may not be enough. Furthermore, as long as there is public ownership, the bill's ban on state or municipal program censorship may not be completely effective in protecting important Constitutional rights.

Permitting public ownership in situations where private ownership is possible may not benefit anyone, least of all municipalities. Even when a municipality has sufficient resources to construct or acquire a cable system, it frequently does not have the ability to operate the system in a way that will serve the best interest of the public. Furthermore, although cities in South Dakota may be capable of running utilities, they are not structured to make decisions about programming. The city council process, which is discussed below, simply does not lend itself to the kind of decisionmaking which a business like cable television service requires.

Financial requirements and risks.—Construction of a cable system requires a substantial initial capital investment on which there is likely to be no return, sometimes for as long as 10 or 15 years. Furthermore, the investment is a relatively risky one. Because developments in technology are occurring so rapidly, expensive equipment in which a municipality has heavily invested may become obsolete and have to be replaced. For example, the FCC is now considering a plan to reduce the spacing between communications satellites, many of which provide programming to cable systems. If accepted, this plan may render earth station receivers that many cable systems now own inadequate and require installation of new and more expensive equipment.

In addition, because cable television is not an essential service, there is no assurance that there will always be customers as there are for other, more traditional kinds of publicly-provided services such as electric power or telephone service. Unlike electricity and telephone service, the entertainment and informational services provided by cable systems can be readily obtained from other sources such as broadcast television, newspapers, magazines, and movie theaters. With the introduction of new kinds of information distribution systems such as MDS, direct broadcast satellites, low power TV, and home video products, even residents of rural communities such as those served by many cable systems in South Dakota will have plenty of alternatives to cable service.[5] In short, it is fairly well-established that investment in a cable system will take quite some time to become profitable, and there is no guarantee that it will remain profitable. As a taxpayer, I have serious reservations as to whether increasingly limited public funds should be put in such a high-risk venture.

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[3] For statistics on South Dakota systems, see attachment A.

[4] The outcome of the legislative fight is discussed below.

Impact on service.—Operation of a modern cable system involves much more than just stringing wires and running a billing office. From a technical and safety standpoint, successful operation of even a small cable system requires engineering and technical personnel capable of dealing with sophisticated electronic gear. Just to be financially viable, not to mention competitive with other services in the video marketplace, a cable system needs a trained marketing staff. Because of the relative youth of our industry, there is a limited pool of qualified professionals for whom publicly-owned cable systems with limited resources must compete. Even if cities can afford to pay the kinds of salaries qualified professionals command, they may have difficulty reconciling departures from the usual civil service pay scale. Municipalities which select a nonprofit form of ownership will be at an even greater disadvantage in attracting necessary personnel because they cannot supplement management salaries with profit participation incentives.

One of the main arguments for public ownership is that the cable system's earnings will be used locally, to benefit the system and the community rather than to defray costs of corporate overhead or to fund ventures in other communities where, for example, a nationally-based private company may have operations. There are two flaws in this argument. First, assuming that a publicly-owned operation is profitable, there is no assurance that local officials will not "bleed" the cable system in order to subsidize other more crucially needed municipal services. In light of dwindling local tax revenues and federal funding, the temptation to do this may be too strong for many local officials to resist. Second, perhaps the only way for a municipality to provide the management expertise essential to quality cable service may be to subcontract operation of the system to a nationally-based private company, thereby losing the very advantages that public ownership was designed to produce.

Potential for abuse.—Even the most ardent proponents of public ownership acknowledge that it may well present a special threat to First Amendment free expression. Once again, one of the main arguments in favor of public ownership is that it will ensure access to more local and diverse viewpoints than will private ownership. We submit that the exact opposite may be true. If a cable system is run by a city, you must bear in mind that the city is run by officials affiliated with a particular political party who may or may not be able to withstand the temptation to politicize local programming not so much through outright censorship as through seemingly benign measures such as scheduling coverage of certain governmental events during more advantageous time periods or diverting funding to programs that benefit dominant political forces or preferred interest groups.

The bill attempts to guarantee free expression by prohibiting government censorship of programming. Unfortunately, when a cable system is publicly owned, the means of insulating programming from the system owner's control are usually impractical or ineffectve. It has been suggested, for example, that control over programming can be removed from a municipal owner by formation of a separate corporation or corporations. This approach often results in a Byzantine structure, the cost and inefficiency of which may far outweigh any benefit. Another familiar response is formation of an independent citizens' board to make programming decisions and administer access channels. The effectiveness of such a body is, however,

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[5] Even in a predominantly rural state such as South Dakota, the public can get information or entertainment from a number of sources; current media sources in South Dakota are as follows:

Licensed TV stations	19
Licensed TV translators	36
Outstanding TV translator construction permits	8
TV translator applications on file	3
Low power TV applications on file	7
Licensed MDS facilities	1
Outstanding MDS construction permits	1
AM radio stations	35
FM radio stations	38
Daily newspapers	12
Weekly newspapers	139

limited by the quality of the appointments, the dedication of the appointees, and the strength of the government's commitment to provide them with the resources they need to carry out their duties in a truly independent fashion.

In making all of these observations, I do not mean to imply that all municipal officials would succumb to temptation. At least in South Dakota, we are fortunate to have exceptionally dedicated public officials who carry out their duties with the utmost integrity. Nevertheless, the financial burdens on local government are particularly onerous at this time, increasing the temptation to "misuse" a cable system, and I do not mean that word in perjorative or unlawful sense.

The South Dakota Legislature's recognition of the importance of protecting these rights is evident from the Bill it ultimately enacted. In South Dakota, only those municipalities which have publicly-owned telephone systems and have not awarded cable franchises to a private company can finance, construct, and maintain cable systems, but the are not permitted to operate them. (House Bill 1283).

No one could disagree that the First Amendment interests at stake are extremely important. Therefore, it behooves Congress to take whatever measures are necessary to protect the public interest against even a few possible cases of abuse. An outright prohibition on initial public ownership and operation of a cable television system in instances where there are private alternatives is one way to prevent the serious problems I have discussed. If local governments are permitted to enter the cable industry through acquisition, they should not be allowed to do so at bargain prices. More important, they should not be permitted to buy-out an operator unless his performance has been deficient.

As noted above, the timeframe for a cable investment to achieve profitability may often exceed the initial franchise term. This is especially true in South Dakota, where initial per subscriber investment is especially high due to the relatively low density of the communities we serve. A cable operator who makes a large financial commitment and works hard to provide good service to the community deserves a reasonable expectation of renewal. The uncertainty created by the possibility of a municipal takeover, despite the operator's efforts to satisfy the public, will discourage reinvestment and upgrading of the system toward the end of the franchise term and will make virtually impossible for a cable company to obtain financing. Almost all Midcontinent's cable financing comes from local South Dakota banks, which routinely review the franchises in question before committing funds.

Other ownership provisions.—The bill also addresses ownership of cable systems by other media [§ 605(a)(1)] by telephone companies [§ 605(d) and (e)], and by foreign interests [§ 605(b)]. We support the Bill's open entry policy for other media and agree that federal, state, and local regulatory bodies should be foreclosed from imposing such restrictions. With respect to ownership of cable systems by telephone companies and foreign interests, we also support the continued role that the Bill envisions for the FCC. Because the advisability of telco or foreign ownership of cable systems may vary at different times and under different circumstances, it is best that there not be a hard and fast rule either prohibiting or allowing it unrestrictedly. The matter is best dealt with by an administrative agency with the expertise of the FCC, acting, of course, with the benefit of policy guidance that the Bill contains.

II. RATE REGULATION

If you were to ask cable operators in South Dakota their greatest on-going regulatory problem, I am sure the overwhelming majority would tell you that it is rate regulation. For this reason, we support measures in the bill that would allow the marketplace to set rates [§ 607] and urge you expressly to entrust all rates, including those for auxilliary and basic services, to the marketplace as well, at least in situations where there are alternative sources for the services that cable systems provide.

In South Dakota, very few municipalities can lawfully regulate rates without the formal action of the city council or local governing body. Although procedures that must be followed are intended to protect the public at large; it is possible for one or two individuals to abuse the public process and hold up a rate increase for inordinate amounts of time, subjecting the cable operator to intolerable financial uncertainty in the interim and putting an unncessary strain on municipal resources. Relatively straightforward rate proceedings have been known to drag on for months largely because of the efforts of a few individuals. In the situations with which I personally am familiar, the time and effort consumed did not result from public controversy or lengthy studies of complex economic issues. The nature of the rate proceeding in South Dakota is such that it can be misused as a vehicle to draw attention to concerns that are often unrelated to cable service. Surprisingly, the smaller the community, the more often this happens, and the lengthier and more divisive the process.

Obviously, when a rate increase is held up indefinitely, the cable operator suffers. It is impossible to project revenues and, correpondingly, to make long-range financial plans. Initiation of new services, needed upgrades, or acquisition of new equipment must be delayed, often preventing the system from taking advantage of supplier's special discounts or other incentives. Uncertainty also affects the system's ability to obtain financing, as lenders insist upon a reasonably precise demonstration of the system's financial prospects.

The ultimate losers, of course, are taxpayers, cable subscribers, and local residents who want to become subscribers. Unnecessarily long and involved rate proceedings divert the energy and time of municipal officials from more pressing concerns. When cable operators are denied the revenues necessary to operate, existing service may deteriorate and extension of service to new areas is impossible.

Certainly we recognize that the bill does not require state or local officials to regulate rates. Because they are subject to intense (if not broad based) local political pressure, however, municipal officials may need some support in their efforts to stay out of the rate regulation thicket and to leave rate regulation where it belongs for a nonessential service—in the marketplace.

III. OTHER PROVISIONS

Access [§ 606].—Most cable operators in South Dakota have experienced little call for "access" to their systems. In most small towns, there is a greater opportunity for informal, face-to-face contact. Residents of the communities that we serve generally are not inclined to rely upon the mass media to share local concerns and ideas to the same extent that urban residents might. Nevertheless, what little experience we have had suggests that the quality of cable service could be seriously jeopardized if a system is required to dedicate channel capacity for the use of the public or commercial lessees without a reasonable opportunity to protect his property and his business against damage by technically unqualified or otherwise irresponsible channel users.

Other provisions relating to program content.—We support the bill's position in absolving cable operators from legal liability resulting from use of channels or presentation of programming by other (§ 608). Because cable television is not subject to the same capacity constraints as broadcasting, the bill is correct in removing cable systems from the Fairness Doctrine and equal time requirements (§ 609).

The FCC's role.—Because of its expertise, the FCC should continue to be involved in cable television technical standards and compatability (§ 613), record-keeping (§ 614), and particularly [illegible] ensuring that state and local franchise fees remain reasonable (§ 611). The Commission might also play a beneficial role in promulgating and administering regulations implementing the bill's privacy provisions (§ 612). In all of these areas, a continued federal presence is necessary to ensure the attainment of national policy objectives. We agree that the FCC should have only a limited role in the area of signal carriage (§ 609) and would encourage you to use of the legislative history to caution against the dangers of overregulation at all levels, including the federal level.

Sports blackout (§ 616).—Because there are no professional sports franchises in the State of South Dakota, we have no immediate interest in the sports blackout provisions. However, as a matter of law, we believe that this issue is more appropriately dealt with in copyright legislation. As a matter of principle, we also believe that sports interests should be compensated but not protected at the expense of the public.

Signal piracy (§ 705, as amended).—We strongly support the bill's effort to provide long-needed protection against theft of cable services in a clear federal statutory provision.

CONCLUSION

In summary, we wholeheartedly concur with the basic thrust of the bill and its allocation of regulatory responsibility among the various levels of government in particular. There are only two areas where we believe revision is needed to insure achievement of congressional goals: (1) If state and local regulatory bodies are to be prevented from impeding national objectives, their ability to enter the cable business must be more carefully circumscribed. (Specifically, they should be prohibited from initiating cable service where private enterprise can provide it, and they should be permitted to acquire an existing system only when the private operator defaults and then only for fair market value); and (2) the bill's obvious preference for marketplace regulation should be expanded in the area of rate regulation. We enthusiastically await passage of this legislation, as we believe that it will make it easier for our company and many others to provide the kind of service that the American public deserves.

ATTACHMENT A

Town	Basic subs	Population
South Dakota:		
Aberdeen	8,446	25,956
Arlington	200	991
Armour	200	819
Bell Fourche	1,158	4,692
Big Stone City	672	231
Britton	515	1,590
Brookings	2,[illegible]00	14,951
Burke	350	859
Canton	463	2,886
Central City		892
Chamberlain	760	2,258
Clarke	380	1,351
Clearlake	300	1,310
Custer	370	1,830
Deadwood		2,035
Desmet	300	1,237
Edgemont	400	1,468
Falkton	200	981
Flandream	400	2,114
Freeman	200	1,462
Gettysburg	550	1,623
Gregory	350	1,503
Hot Springs	1,130	4,742
Howard	230	1,169
Huron	4,426	13,000
Ipswich	245	1,153
Lake Preston	150	789
Lead	2,092	4,336
Lemmon	464	1,871
Madison	1,077	6,210
Milbank	1,465	4,120
Miller	586	1,931
Mitchell	4,031	13,916
Mobridge	1,050	4,174
Parkston	300	1,545
Pierre	4,787	11,973
Platte	320	1,334
Rapid City	11,900	46,492
Redfield	1,148	3,027
Rosholt	137	446
Salem	300	1,486
Sisseton	731	2,789
Sioux Falls	14,770	81,343
Spearfish	1,693	5,251
Springfield	(2)	1,377
Sturgis	1,645	5,184
Vermillion	1,297	10.,136
Volga	200	1,221
Watertown	5,283	15,649
Webster	669	2,417
Wessington Springs	200	1,203
Wilmot	177	507
Winner	1,152	3,472
Yankton	2,279	12,011

[1] A part of lead/deadwood systems.

[2] U.C.

STATEMENT OF SUSAN FRATKIN, TREASURER, JOINT COUNCIL ON EDUCATIONAL TELECOMMUNICATIONS

Mr. Chairman, I should like to express my appreciation for this opportunity to testify on behalf of the members of the Joint Council on Educational Telecommunications. The JCET was organized thirty-two years ago as the Joint Committee on Educational Television to give leadership to the successful effort to persuade the Congress and the Federal Communications Commission to set aside broadcast channels for noncommercial television.

The JCET (a list of members is attached) has long been education's established mechanism for dealing with new communications technologies and emerging public policy. In the early '70s, the JCET played a key role in getting the Federal Communications Commission to mandate channels for education in cable television as twenty years before it had reserved over-the-air channels in the TV Table of Allocations.

The courts set aside the Commission's prudent action regarding access channels on the grounds that the Congress had not given the FCC sufficient powers to make such a requirement. S. 2172 remedies that situation, and Section 606 puts the weight of Congress clearly behind the requirement that state-of-the-art cable systems grant access to government, educational and other public interest groups.

While it is true that in many cases local franchise agreements have provided access channels for education, local negotiations cannot be depended upon for the implementation of what is properly a matter of national policy. Historically, cable systems with channel capacity exceeding the need for carriage of local stations and few "distant signals" have willingly given some of their excess capacity for the local origination of programs by educational and other interests. The cable operator's self-interest has been served by broadening the diversity of programming available on the cable, and by the public relations value of this demonstration of the cable company's corporate "good citizenship."

While we can join the cable industry in the wish that more educational institutions would capitalize on the opportunities offered by educational access channels, there are many outstanding examples which illustrate the potential benefits ot the institutions, the cable systems and the communities they both serve.

In suburban Baltimore County, Maryland, Catonsville Community College programs a channel on the cable system twenty-four hours per day with a schedule which includes college courses for credit, a nightly community newscast, and, via the college's remote van, live coverage of community events and county council meetings.

In California, San Diego State University not only produces audio programming on "cable radio," but is engaged in exploring the educational application of the interactive "Indax" system. In Omaha, the University of Nebraska is experimenting with Indax for education, with financial support from the Corporation for Public Broadcasting and Cox Communications, operator of the cable system.

The Corporation for Public Broadcasting's Office of Science and Technology has supported other innovative uses of educational access channels. In Spokane, public station KSPS-TV provided the leadership for a multiinstitutional educational consortium which programs not one but five channels on Spokane's cable system. In Madison, Wisconsin, CPB is funding an experiment by WHA-TV which uses the educational access cable channel to "download" computer programs into microcomputers in the schools.

Perhaps the nation's outstanding example of mutually profitable cooperation between higher education and commercial cable operators comes—like cable television itself—from Pennsylvania. Pennarama, the Pennsylvania Continuing Education Cable Television Service, is a unique effort interconnecting many of the cable systems in the state, and progressing rapidly toward its goal of statewide coverage. Penn State has the leadership role on the education side, while the Pennsylvania Educational Communications System, a non-profit organization established by the cable television industry, provides the microwave interconnection of cable systems.

In elementary and secondary education too, there are examples of the coming together of education and cable. In small towns, like Marple Newton, Wisconsin, the schools produce a weekly one-hour magazine program—a school and community oriented Marple Newton "60 Minutes," as it were.

In Wichita, Kansas, the schools fill three channels with programs that supplement classroom instruction and inform the community about what the schools are doing. Board of Education meetings are preceded by a "Board of Education preview" which lets parents and citizens know about the business to be conducted.

In Los Alamos, N.M., viewers have seen a call-in show with the Superintendent, a grade school play and a high school chamber music concert. Springfield, Missouri, schools used the cable access channel to make public the difficult and painful process of budget cutting. In San Antonio, Texas, the Northside Independent School District has presented a wide variety of cable programs, including a marching band festival that drew more than three hundred and fifty phone calls from an enthusiastic community.

Despite all this, access channels for public, educational and government use are threatened, and action by Congress and Federal Communications Commission is required.

The threat comes from the sky. Satellites already provide a wide variety of pay television and other programming for the cable audience, and the number of services grows greater. Some are, themselves, educational, including the noncommercial Appalachian Community Service Network, a member of the Joint Council. CPS Cable and Warner-Amex's ARTS present a wide range of cultural fare. Satellite-delivered cable program services range from classic theater to "X-rated" programming.

The hundred channel systems now being promised in the big cities may have room for all of these new services and for the grade school play and the college telecourse, but in small towns and in markets already built with what was "state-of-the-art" equipment only a few years ago the operators of twenty-, thirty- and forty-channel systems are now asking themselves if the Entertainment and Sports Program Network or Eros might not generate bigger contributions to the corporate bottom line.

Their hearts may tell them one thing, their pocketbooks another. S. 2172's Section 606 will make their decisions easier.

Statement of Irving Goldstein, President, Satellite Television Corp.

Satellite Television Corporation (STC) is pleased to have this opportunity to submit its views on the future of the home entertainment and information industry in conjunction with the subcommittee's hearings on cable television and other new media. In particular, STC is pleased to be able to report on one of the most promising new departments in home video—direct broadcasting by satellite or DBS. DBS is a technology which will make it possible to broadcast multiple channels of television programming directly from satellites in orbit to individual homes, thereby broadening the range of viewing options available to the American public. In addition, the development of DBS will strengthen the U.S. economic position both at home and abroad. STC, a subsidiary of Communications Satellite Corporation (COMSAT), is the pioneer in this field, having been the first company to request Federal Communications Commission authority to construct a DBS system. STC's application was filed in December 1980 and is now being considered by the Commission, along with a number of other applications filed subsequently by other companies.

THE STC PROPOSAL

The satellite system

STC's system will include both space and ground segments. The space segment will be composed of operating satellites and in-orbit spares. Initially, STC is seeking permission to construct two satellites (one operating and one spare) which will be used to initiate program service to an area roughly corresponding to the Eastern Time Zone of the United States. Subsequently, STC plans to provide nationwide service using four operating satellites and two in-orbit spares. The operating satellites will be spaced approximately 15-20° apart along the geostationary arc.

STC's satellites will represent a major advance in the state of the art over satellites being used commercially today. A principal technical innovation will be their high power; each channel will transmit at a power level 10 to 40 times greater than that of existing domestic and international satellites. In addition, a complex shaped-beam antenna system will be used to control the pattern of coverage. These innovations will enable STC's spacecraft to cover irregularly shaped, time zone sized areas while transmitting signals that can be received by small, affordable home antennas.

STC's satellites will make exceptionally efficient use of the frequency spectrum and orbital arc. The design selected permits frequencly reuse from satellite to satellite so that each frequency yields a channel nationwide. Satellites of many DBS operators could be co-located with STC's so that consumers would be able to obtain multiple services with a single receiving antenna should they choose to do so.

Transmissions to the satellites will orginate at a control facility and broadcast center, located in the western United States. Backup transmission and engineering support facilities also will be constructed. In addition, the ground segment will include millions of units of home receiving equipment to be installed at customer premises throughout the country.

Subscribers will view STC's programming on their regular television sets. To receive the satellite transmissions, however, each household will need a parabolic "dish" antenna, typically 2½ feet in diameter. It will be possible to mount these antennas on rooftops or place them in any location that has an unobstructed biew of the satellite. (Multiple dwelling units will utilize a single "master" outdoor receiving antenna.) Because STC's service will be supported by audience subscriptions rather than advertising, the satellite signals will be scrambled to prevent piracy or other unauthorized reception. Accordingly, viewers will also need equipment to descramble the signals and otherwise process them for high quality video reception. This function will be performed by an indoor electronics unit located close to the subscriber's television set and linked by a cable to the antenna and its associated outdoor electronics.

A unique feature of STC's proposed system is that each home installation will be individually addressable. This will enable viewers to subscribe to selected programs on a pay-per-view or pay-per-series basis.

The program service

As shown in table 1, STC's program service will consist of three channels of diverse television fare. STC plans to devote considerable resources to the development and acquisition of high-quality programing in order to supplement, rather than duplicate, what is available on conventional television. One of STC's channels, called "Superstar," will operate 24 hours a day with a mix of major motion pictures and other quality entertainment. This is the channel that, typically, will appeal to the greatest number of people. Each of the other two channels will have about 16 hours of daily fare, including both entertainment and informational programing. Named "Spectrum" and "Viewer's Choice," these channels will carry a broad range of special interest programing targeted to smaller segments of the viewing audience. In all, fully one-third of STC's schedule will be devoted to nonentertainment programing, including educational, instructional, children's and public affairs programing—much of it in prime time.

STC's programing strategy will be characterized by "counterprograming" and "narrowcasting." To counter-program, STC intends to provide viewers with a wide range of program choices at all times throughout the broadcast day. For instance, on a given evening an STC subscriber might be offered a choice of a motion picture or theater special on the "Superstar" channel, a cultural attraction or public affairs program on "Spectrum," and an educational or sports program on "Viewer's Choice." In this way, STC will be able to satisfy simultaneously the program preferences of viewers with differing tastes and interests.

The term "narrowcasting" refers to the ability to gather together small groups of viewers who share a preference for various types of special programing. While the program strategies of conventional, advertiser-supported broadcasters necessarily have been directed towards the mass audience, the technology of direct satellite broadcasting permits the aggregation of viewers sharing special interests, even though these viewers may be relatively few in number and scattered across wide areas. Moreover, the economics of subscription television make it feasiable for these groups to support the type of programing they desire. STC plans to take advantage of this unique technical and economic capability to serve the broadest possible cross-section of the public's viewing needs, tastes and interests by placing special emphasis on "narrowcast" programing, much of which would not be commercially viable on local or advertiser-supported or subscription television services.

STC's programing also will be characterized by a commitment to the family, as evidenced, for example, by the importance it attaches to children's programing. STC plans to offer a variety of daily programing for children of all ages which will neither contain gratuitous violence nor be interrupted by advertising.[1]

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[1] In its proceedings on children's television, the Commission has stated that "direct satellite-to-home broadcasting may offer, in the long run, a greater likelihood than advertiser-supported broadcasting of meeting consumer preferences * * *." Notice of proposed rulemaking, 75 F.C.C. 2d 138, 151 (1979) (children's TV programing and advertising).

In addition to its basic service, STC will make available a number of valuable service enhancements, including stereophonic sound, teletext, closed captioning for the hearing impaired, and a second language audio track that, for example, will enable subscribers to receive programing in Spanish. STC will also incorporate in its system a versatile capability to experiment with a wide range of transmission modes for high definition television. Such experimentation will help build the technological and economic base for HDTV, which then might possibly become feasible as early as the 1990's.

The cost of STC's service will be competitive with other viewer-supported video offerings. In addition to a monthly charge for the three-channel program service, customers will purchase the home receiving antenna and also will have the option to buy or lease the associated electronics, either from STC or from other sources.

As a forerunner to its direct-to-home service, and contingent on approval of its pending FCC application, STC also plans to introduce a two-channel, satellite-delivered pay television service to the northeastern United States before DBS can be available. Subscribers to the forerunner service will be switched over to STC's three-channel DBS service as soon as the latter is introduced.

PUBLIC INTEREST BENEFITS OF DBS

Implementation of DBS, and specifically the STC proposal, will result in numerous important benefits to the public. These benefits include:

A. *Satisfying consumer demand for diversified video services.*—DBS will assist in meeting the substantial, and growing, consumer demand for diversified and specialized home video offerings. As the FCC has stated, "DBS shows promise of greatly expanding and improving the video services available to the American public."[2] The courts and the FCC have repeatedly recognized the importance of increasing the number of media outlets by encouraging the development of new modes of video delivery.[3] Indeed, it has been said that "there is a paramount public interest in fostering competition and diversification of program sources as quickly as possible."[4]

B. *Bringing improved video service to rural and underserved areas.*—DBS will advance the fundamental objective of the Communications Act to make modern telecommunications service available "to all the people of the United States."[5] Despite the wide availability of television in our society, there are still millions of homes that receive only one or two channels or which receive no television at all.[6] In addition, tens of millions of homes do not have access to subscription television. While many of these homes are not likely to be served by cable or other terrestrial media in the foreseeable future, but they can be reached by satellite, no matter where they are located. Thus, DBS will bring rural Americans a major step closer to communications parity with their urban counterparts, and will also benefit those in other areas who are underserved. The FCC has emphasized the "unique capability" of DBS to provide video services to rural and underserved areas.[7]

C. *Promoting competition in the program distribution market.*—The entry of DBS services will inject a much needed element of competition into the program distribution market. Specifically, such entry should minimize the ability of entrenched satellite-delivered pay networks artificially to hold down revenues to program producers and to increase costs to consumers. The U.S. Department of Justice, acting through its Antitrust Division, has supported the prompt authorization of DBS so that it can fulfill its potential as a new source of television service.[8]

D. *Stimulating the production of new programming.*—DBS will be an important new outlet for television programming which should attract new suppliers to the program production market and stimulate the creative industries.[9] For example, STC will devote considerable resources to the development of new programming intended for first-run distribution on its system and subsequently made available to other media on a syndicated basis. Its ability to broadcast simultaneously different types of programming on three channels, and to offer some programs or series on a special pay-per-view basis, will make it financially attractive for STC to invest in a broad range of varying program types.

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[2] Notice of proposed policy statement and rulemaking, Gen. Docket No. 80-603, 86 F.C.C. 2d 719, 729 (1981).

[3] See, e.g., *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972) (plurality opinion); First Report and Order, Docket No. 19671, 86 F.C.C. 2d 299, 303 (1981) (business radio service); notice of proposed rulemaking, 45 Fed. Reg. 69178 (1980) (low power TV proceeding); first report and order, 20 F.C.C. 2d 201, 202 (1969) (cable television service).

[4] Fourth report and order, 15 F.C.C. 2d 466, 536 (1968) (STV service) (emphasis added), aff'd sub nom. National Association of *Theatre Owners* v. *FCC*, 420 F. 2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970).

[5] 47 U.S.C. 151 (1976).

[6] See Office of Plans and Policy, FCC Policy on Cable Ownership, at 62, table 1 (Nov. 1981).

[7] Notice of proposed policy statement and rulemaking, Gen. Docket No. 80-603, 86 F.C.C. 2d at 728.

[8] Comments of U.S. Department of Justice, FCC Gen. Docket No. 80-603, 2-3, 18 (Apr. 30, 1981).

E. Enhancing first amendment values.—The implementation of DBS technology will enhance First Amendment values by furnishing new outlets of communication, diffusing control over the nation's video facilities, and diversifying program service.

F. Preserving the United States' leadership in space technology.—Nations on four continents are currently planning to deploy DBS systems.[10] The development of DBS in this country will further the key national objectives of promoting advancements in the art of satellite communications and maintaining the preeminent position of the United States in the satellite field.[11] Forecasters see a worldwide market for DBS satellites, home equipment and related goods that will be worth billions of dollars by the end of this decade. Prompt authorization of DBS systems may prove decisive to America's ability to compete in this vast developing market. As the National Telecommunications and Information Administration has observed:

"A vital and expanding telecommunications industry is essential to this nation's future economic well being. We must maintain our lead in technology so that American industry can improve its productivity and strengthen its role in international trade. . . . [U]nless we are willing to free U.S. technology, in [DBS] and all other areas of telecommunications, to experiment, we stand to lose many possible benefits. Instead, we will see other countries advance in areas we originally pioneered."[12]

G. Stimulating U.S. economic activity and employment opportunities.—The development of DBS will promote U.S. economic activity in a high-growth, high-technology field which is important to the nation's future. The U.S. Department of Labor estimates that STC's system alone (not counting other U.S. systems or export opportunities) will support up to 23,000 jobs in diverse fields.[13] Furthermore, STC plans to establish a substantial Minority Enterprise Small Business Investment Company (MESBIC) as one means of ensuring that the economic benefits of its new venture are shared by members of minority groups. The U.S. Secretary of Commerce has commented on the important role DBS can play in expanding economic activity and employment opportunities in this country and has urged prompt action to secure the benefits of DBS for the American public.[14] Moreover, President Reagan stressed the promise that DBS holds to stimulate the economy when he wrote that DBS "presents us with a new era of tremendous creativity and makes possible the expansion of delivery systems for new programming and increased employed."[15]

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[9] The courts have observed that the continued economic health of those who create program material is crucial to both broadcasting and cable. *Geller* v. *FCC*, 610 F. 2d 973, 974–75 (D.C. Cir. 1979).

[10] In Europe alone, seven major DBS systems are in preparation. Television Digest, Inc., Satellite Week 4–6 (July 27, 1981). Japan already has launched an experimental system and now has a second system under construction. In addition, Canada and Australia are considering DBS plans.

[11] See, e.g., National Aeronautics and Space Administration Act of 1957, 42 U.S.C. § 2451 (c)(5) (1980); Smith, "Space Policy and Direct Broadcasting via Satellite," in Symposium on Direct Broadcast Satellite Communications 85, 86 (National Academy of Sciences, Apr. 8, 1980).

[12] Comments of National Telecommunications and Information Administration, FCC Gen. Docket No. 80–603, 2–3 (Dec. 5, 1980). In a similar vein, the former Director of Science and Technology Policy has stated: "The third decade in space will bring increasing worldwide involvement and competition. Consequently, . . . it is important to address the growing international competition in space. Together, the Europeans and Japanese will provide competition to the United States for the commercial space market and in the economic applications of space technology—with possible implications for the U.S. balance-of-trade as well as on continued U.S. leadership in space technology and application. Thus, it goes without saying that maintaining our leadership in space technology is essential." Hearing on the President's Civilian Space Policy Before the House Comm. on Science and Technology, 96 Cong., 1st Sess. 12 (1979) (statement of Dr. Frank Press, Director, Office of Science and Technology Policy, Executive Office of the President.)

[13] This projection was calculated by the Bureau of Labor Statistics using its macroeconomic model of the United States economy.

[14] Letter from Malcolm Baldrige, Secretary of Commerce, to Robert E. Lee, Acting Chairman, FCC (Apr. 7, 1981). Secretary Baldrige has also stated that "the future of U.S. industrial competitiveness is inseparably linked to the health of our high-technology industries." Washington Post, April 23, 1982.

[15] Letter from President Ronald Reagan to American Women in Radio and Television (May 5, 1981).

H. Advancing the goals of the Communications Act with respect to new uses for radio.—Under the Communications Act of 1934, the FCC is directed to "study new uses for radio [i.e., the radio frequency spectrum], provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."[16] DBS is a radio service within the meaning of this provision and one that, only a few years ago, was thought to be technologically infeasible. Moreover, DBS is not only innovative in itself, but also can serve as a vehicle for the introduction of other technological advances. U.S. policymakers therefore should continue to encourage the development of this new and useful radio technology.

Significantly, DBS can provide all the benefits listed above without adversely affecting the nation's existing conventional broadcasting system. All studies done to date clearly show that DBS poses no threat to existing services, and both the FCC[17] and NTIA[18] have also concluded that DBS will have a negligible impact on existing television stations. In this connection, it should be noted that STC and most other DBS applicants propose pay television services exclusively. Moreover, even though some DBS applicants propose advertiser-supported services, these will supplement, not supplant, conventional television. Cable television has a much larger audience share that DBS will have and it carrier both advertiser-supported and subscriber-supported programming. Yet the FCC has found that cable TV does not have a cognizable adverse impact on conventional television, and that finding has been sustained judicially.[19]

In fact, DBS will actually improve conventional television by increasing the stock of available programming. For example, be devoting considerable resources to the development of original programming intended for first run distribution via DBS, STC will increase the volume and diversity of program fare in circulation, much of which could be available for second-run distribution by "free" TV. In addition, competition from alternate media could strengthen conventional television by making it more responsive to viewers' needs.[20]

DBS also will increase the supply of programming available to cable systems. In fact, in areas served by cable systems, DBS signals could be received at cable headends and distributed to households via cable as well as by direct satellite-to-home transmissions. In addition, DBS will go "head to head" with cable and compete for viewers directly. Whether DBS, with its relatively limited channel capacity, can compete effectively with cable is uncertain at this time. Obviously, much depends on the ability of DBS to differentiate its product—for example, by offering more attractive programming. Of equal importance will be the price to consumers of DBS service relative to cable. Whatever the result of the DBS-cable competition, the consumer is certain to benefit from the expanded choice and diversity.

CONCLUSION

DBS, in the words of one expert observer, is a "stunning technology."[21] As a new telecommunications resource for the nation, it has vast potential to stimulate the economy, to satisfy intense consumer demand, and to advance other public interest goals of fundamental importance. For all these reasons, Satellite Television Corporation is prepared to accept the challenge of making DBS a reality—prepared to accept the risk of succeeding or failing on its merits in the new, exciting, competitive video marketplace of the 1980's and beyond.

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[16] 47 U.S.C. 303(g) (1980).

[17] Notice of proposed policy statement and rulemaking, Gen. Docket No. 80-603, 86 F.C.C. 2d at 741.

[18] Comments of National Telecommunications and Information Administration, FCC Gen. Docket No. 80-603, 21 (Apr. 15, 1981).

[19] Report and order, 79 F.C.C. 2d 663 (1980) (repealing cable distant signal and syndicated program exclusivity rules), aff'd sub nom. *Malrite T.V., Inc.* v. *FCC*, 652 F.2d 1140 (2d Cir. 1981). Broadcast officials are also beginning to realize that their industry can continue to prosper, even in the face of competition. For example, ABC Executive Vice President Fred Pierce recently stated that commercial television and new media such as cable are "complementary and synergistic" and that both will continue to grow. Daily Variety, Apr. 20, 1982.

[20] See, e.g., First report and order, 44 Fed. Reg. 60091, 60095 (1979) (STV service); Fourth report and order, 15 F.C.C. 2d 466, 517 (1968) (STV service).

[21] Dizard, "Direct Broadcast Satellites (DBS); The U.S. Position," in 2 Cable/Broadband Communications Book 73 (Hollowell ed. 1981).

Statement of James K. Hall

My name is James Hall. I am a member of a Citizens' Committee on Cable Television in Albuquerque. We have been appointed by the mayor and the City Council to research and review the state of the art in cable television, and the stipulations of current franchise agreements. I also serve as a Director on the Board of the local media access center and on the Board of Directors for the National Federation of Local Cable Programmers (NFLCP).

My interest in submitting written testimony to the Senate Committee on Commerce, Science and Transportation Field Hearing held in Albuquerque on February 16, 1982 is rooted in the fact that citizens who are not directly affiliated with government or the cable industry will be directly affected by any legislation enacted and need an opportunity for imput into the legislative process. Therefore, I am requesting that this testiomony be included in the field Hearing Record.

As Senator Schmitt and members of this committee are well aware, the technological changes occurring at an unprecedented rapid rate will have profound and irreversible effects on the daily lives of all citizens. Inter-active television, home security and a vast amount of information at our fingertips are realities that loom on the immediate telecommunication horizon. Access to information is predicted by some to be the key to the future. Can this country afford informational "haves" and "have-nots" is a question to be grappled with on both a local and a national level. Deregulating cable television services calls for a broad-based discussion and dialogue.

To insure that citizens will be served and not ruled by technologies in the future, it is imperative that states and municipalities retain the right of regulating cable television services and rates on a local level. It is my firm opinion that the freedom to determine what form of ownership will best serve a particular community should be left in the hands of local govenment. As other witnesses have testified, the current trend is towards cable system ownership in the hands of a few. There are both advantages and disadvantages to any form of ownership. The choice of an MSO, a local cooperative or operation by the municipality itself can best be determined by the needs and limitations of a local community.

I am also in agreement with the testimony of other witnesses who have stated that after a franchise is awarded, cable television operates as a de facto monopoly in the vast majority of cases. This is true even if the terms are non-exclusive. Because public rights-of-way are used by the cable operator, local regulation is necessary.

Other witnesses have briefly mentioned the importance of community services provided by cable television. I would like to add to those statements. I am speaking from both the perspective of consumer and as a general contractor who is a member of the local business community.

The technology of cable television is able to provide a large number of entertainment and information channels. As a result of an original FCC mandate, a small number of these available channels were set aside for government, educational, public and leased access. When the Supreme Court ruled that the FCC could no longer make that requirement, the provision of these channels became standard local requirements during the franchises process. From the vantage point of my position on both national and local Boards of Directors, the use of the cable television medium as a cost-effective communications resource in communities all across the country. For a fraction of the amount necessary to utilize full power broadcast television, local government and educational institutions, local business and the general public have access to the medium of television. Only if local government can continue to require these access channels will the First Rights of all citizens be assured and protected.

The issues being considered by this committee are critical and will affect citizens for years to come. I urge you to solicit a diverse range of perspectives. The concerns of cable operators and elected officals are being heard and considered. In addition to these participants, there are consumer and citizen groups who have done extensive research in the area of telecommunications. The expertise and experience of these organizations would provide additional information for the Committee.

Thank you for your time. I appreciate the opportunity to express my experiences and perspective.

Statement of James D. Meekison, President, Cable America, Inc.

I am James D. Meekison, president of Cable America, Inc. Cable America, a Delaware corporation, owns the controlling interest in two U.S. cable television systems: Cable Atlanta, Inc., serving the city of Atlanta, Georgia and portions of several adjacent cities and counties; and Valley Cable Television, Inc., serving the West San Fernando Valley section of Los Angeles, California. Cable America also owns the controlling interest in East Valley Community Cable Company, Inc., one of several applicants for a franchise to serve the adjacent East San Fernando Valley area of Los Angeles. The minority ownership interests in all of these companies—ranging up to 27.5 percent—are held by local citizens who live in the areas to be served.

Cable America is wholly owned by Cablecasting, Ltd., a Canadian company operating systems that serve portions of Toronto, Winnepeg, Calgary and St. Thomas. In providing service to these cities over the years, Cablecasting earned a reputation for excellence and for expertise in meeting the needs of urban communities. Indeed, our demonstrated record of sustained high quality service was a critical part of Cable America's ability to compete successfully for franchises in California and Georgia.

There are several reasons why the adoption of Section 605(b) of S. 2172—which authorizes the FCC to prohibit Canadian ownership of U.S. cable systems on the grounds of "reciprocity"—would not be in the public interest. The balance of my statement sets for those reasons and then briefiy summarizes the underlying facts.

First, the reciprocity provisions of S. 2172 are blatantly anticompetitive and protectionist. The restrictive FCC rules sanctioned by this legislation would absolutely prohibit Candian-owned companies, without regard to their qualifications, from competing for local cable system franchises. As in all cases where competition is thus impaired, this legislation would reduce diversity and limit the choices otherwise available in the marketplace.

Second, under the guise of fair play, these reciprocity rules would preempt the right of the local franchising authority to decide for itself which applicant would best meet the particular needs of the community. Even if the excellence of a Canadian company's service record and the merits of its bid made it the clear-cut favorite, the local franchising authority would be foreclosed from exercising its free choice. This runs directly counter to the strenuous efforts made over the last decade—by the cable industry, the FCC, representatives of city and state governments and, indeed, the U.S. Congress—to diminish the federal government's power over cable television and to place whatever limited regulatory authority was needed in the hands of the cities and states.

Third, the reciprocity provisions of S. 2172 are contrary to the United States' longstanding effort to reduce trade barriers among friendly neighbors, particularly in the field of foreign investments that bring dollars back into the United States and create additional jobs. S. 2172's imposition of restrictions on foreign investments only in the telecommunications industry (and, indeed, only in the cable segment of that industry), represents the type of sectoral reciprocity that U.S. international economic policy, through several different Administrations, has consistently opposed. As Ambassador William E. Brock, III, the U.S. Special Trade Representative, testified before the House Telecommunications Subcommittee on March 3, 1982, the day before S. 2172 was introduced: "[W]e do not believe that sectoral reciprocity legislation would be a useful tool" in facilitating exports of U.S. communications services.

Fourth, there is no social or economic need for the reciprocity provisions of S. 2172. The impetus for the proposal seems to have originated primarily with U.S. cable systems intent on eliminating Canadians from the competition for the few remaining unfranchised urban areas left in the United States. As the FCC has twice before recognized—in 1976 and 1980—there is no national interest at stake here; the proposal to restrict foreign ownership of U.S. cable systems, in the 1976 Commission's view, is "a cure for which there is no disease." Canadian-controlled companies, constituting virtually all of the foreign-owned cable systems, still serve only 3.5 percent of U.S. cable subscribers.[1] Moreover, that figure should not increase substantially in the years ahead; competition for the remaining share of the U.S. market will, as in the past, limit the growth of foreign-owned systems.

1. BY LIMITING COMPETITION AND RESTRICTING CHOICE AT THE LOCAL LEVEL, S. 2172'S RECIPROCITY PROVISIONS WOULD, OVER THE LONG TERM, REDUCE THE QUALITY OF U.S. CABLE SERVICE

The experience of U.S. cities over the last decade shows that the increased competition provided by Canadian-owned cable companies directly improved the quality of service being offered. The need to overcome, at the local level, the same charge of unfairness that is implicit in S. 2172, has forced Canadian-owned firms to try harder and to perform better.

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[1] See appendix attached hereto.

Cable America, for example, was approved in Georgia and California in large part because of its excellent track record, which included demonstrated technological innovation, efficient management, and the commitment of the company's top officials to work personally in the local community during the construction and initial operational phases of the new cable systems. Most recently (last month), the Los Angeles Department of Transportation rated Cable America's company first among all of the competitors for the East San Fernando Valley section of the city. In March of this year our company had been rated first by CTIC Associates, Los Angeles' consultant in the selection of a franchise for the East Valley.

We are proud of our record and of the support we have received both from the local authorities in our franchised areas and from the subscribers we serve. Other Canadian-owned companies—including Rogers, McLean-Hunter, and Selkirk—also have exemplary records of service in the United States. Indeed, Canadian companies have won awards for programming excellence, and for originating some of the most innovative local service features found in the cable television industry. The elimination of Cable America and other Canadian companies from the competition for franchises thus would have more than a theoretical impact. It would have a seriously adverse effect, over the long term, on the quality of cable television service being provided to the American public. It is the clear realization of this fact, I believe, that has led so many city officials to voice their oppostion to any legislative or regulatory measure that would restrict their right to choose the company they believe would provide the best available local service.

2. THE SECTORAL RECIPROCITY PROVISIONS OF S. 2172 ARE DIRECTLY CONTRARY TO LONG ESTABLISHED PRINCIPLES OF U.S. INTERNATIONAL ECONOMIC POLICY

The United States has long recognized that the interests of all nations are best served when free market forces are allowed to determine the magnitude and direction of worldwide investment flows.

The Carter Administration, carrying forward the commitment of past Administrations to lessen restrictions on free trade, and speaking through its Assistant Secretary of the Treasury for International Affairs, was quite clear:

> We have an open door for foreign investment in this country, not as an accommodation to foreigners or their governments but because such new investment provides important benefits to our own economy. The notion of discriminating against investors simply on the basis of where they come from has never had any economic rationale, and in today's economic environment it would be at cross purposes with our highest priority domestic economic objectives.[2]

The Carter Administration's Assistant Secretary of State for Congressional Relations also opposed the application of reciprocity in the field of international investment policy:

> "In our view, the general concept of reciprocity . . ., although appealing in theory, would be difficult to apply to U.S. investment policy. We believe it is more appropriate to continue to encourage other countries to liberalize investment regulations rather than adopt more restrictive policies ourselves."[3]

Ambassador Brock, speaker for the Reagan Administration, has been even more specific on the issue of what he calls "sectoral reciprocity"—reciprocity that deals with only one sector of goods or services. Opposing the sectoral reciprocity approach of H.R. 5158, Mr. Brock testified on March 3, 1982:

> "We have serious reservations . . . regarding the use of sectoral reciprocity as a tool [in facilitating U.S. exports of communications services] . . .
>
> "I am concerned when I hear the argument that [sectoral reciprocity] legislation is needed to give us a weapon to use in dealing with our trading partners. If this would be a weapon, I'm not certain in which direction it would be pointing. It might be pointing at ourselves . . .
>
> "We will have to negotiate on the basis of seeking mutual advantage. We will have to find a balanced package of concessions which satisfies all sides. If we take an approach of narrow sectoral reciprocity, this will not be possible."

The foregoing statements from representatives of different Administrations amply demonstrate the consistency of the U.S. policy against legislated reciprocity, particularly sectoral reciprocity. They make clear that reciprocity is not a good cause to limit foreign investment in the United States, even where the relevant facts in one country "mirror" the facts in the other. Moreover, the facts giving rise to Canadian restrictions on the foreign ownership of cable systems in Canada do not mirror the facts of today's U.S. cable industry. Canada limited foreign ownership of cable systems only because the overwhelming amount of American programming on Canadian television was seen as a direct threat to the survival of indigenous Canadian culture.

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[2] Statement by the Honorable C. Fred Bergsten, Assistant Secretary of the Treasury For International Affairs, Before the Subcommittee on Commerce, Consumer and Monetary Affairs, Committee on Government Operations, House of Representatives, released July 30, 1979, at pp. 4–5.

[3] Letter from J. Brian Atwood, Assistant Secretary for Congressional Relations, to the Honorable Paul Trible, House of Representatives, Oct. 22, 1979.

Prior to the 1969 directive that first placed alien ownership restrictions on Canadain cable systems, Americans owned or controlled eight of the ten largest cable companies in Canada. Foreign controlled companies served 55 percent of all Canadian subscribers. By the late 1960's, cable television in Canada was dominated by foreign companies, most of which were American. This contrasts sharply with the 3.5 percent of U.S. subscribers that today are served by Canadian-controlled companies.

In sum, one thing is clear: reciprocity has never been sanctioned as a part of the United States international investment policy. American television's longstanding, ongoing influence on Canada's cultural identity has no counterpart in the United States. Given these obviously disparate circumstances, the calls for reciprocity in the cable television area ring as hollow now as in 1976 when they were first made.[4]

3. SERVING LESS THAN 4 PERCENT OF ALL U.S. CABLE SUBSCRIBERS, CANADIAN COMPANIES POSE NO THREAT TO THE CONTINUED GROWTH OF AMERICAN CABLE OPERATORS

Despite their continued efforts to obtain new cable franchises in U.S. cities and to acquire existing U.S. Cable companies on a limited scale, Canadian-controlled companies still serve less than 4 percent of all U.S. cable subscribers.[5] This small percentage should not grow substantially in the years ahead, for at least two reasons. First, competition for the remaining franchises is intense; while the Canadian controlled companies may win their share of new franchises, there seems to be no reason why they would be any more successful in the future than they have been in the past. Second, the construction and operation of new cable television systems in urban areas is an extremely capital intensive business. Canadian companies, while they have access to most capital markets, can acquire new capital only in rough proportion to their current size. American multiple system operators, most of whom are much larger and all of whom, in the aggregate, are far more numerous than Canadian companies, can thus be expected to control the lion's share of the billions of dollars of new capital that the U.S. cable industry will require in the next decade.

Two years ago U.S. cable interests petitioned the FCC to adopt almost the same reciprocity rules now suggested in S. 2172. The FCC acted promptly and decisively to reject that reciprocity proposal. It recognized, among other things, that Canadian companies posed no real threat to American interests. "While, in the absence of restrictions, foreign interests may increase through the acquistion of new franchises, it seems likely that the overall percentage of subscribers to systems with foreign investment will remain low as U.S. companies continue to expand their operations.[6]

In rejecting the proposal to restrict Canadian ownership on the basis of reciprocity, the Commission also recognized the salutary effects of Canadian competition and of unimpaired local choice, as well as the absence of any public interest need to impose such restrictions. "The receptiveness of local authorities to Canadian investment suggests that the availability of this source of capital and experience is a considerable attraction. Without some real evidence of need, we see no reason for commission interference in this process or why local and state authorities are not in a position to consider the qualifications of foreign companies on a case-by-case basis." [7]

Finally, the Commission also recognized the reciprocity proposal for what it was: "[I]t would appear that [the reciprocity] restriction would merely promote the self interests of the domestic cable television industry at the expense of additional competitive alternatives for the public in the franchising process." [8]

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[4] Aside from the merits of the reciprocity issue, S. 2172 would place the reciprocity decision in the FCC, clearly the wrong forum for the formulation of what is essentially international economic policy. As the Commission itself noted:

"(Nothing) suggests any general responsibility on the part of the Commission to intervene in issues of foreign trade and commerce. There is no showing in this proceeding that a reciprocal agreement would improve communications service available in the United States. To the contrary, it seems likely that reciprocal treatment between the United States and Canada would merely reduce competition to provide cable television service in the United States." Foreign Ownership of CATV Systems, 77 FCC 2d 73, 80 (1980).

[5] See footnote 1, above.

[6] Id.

[7] Id. at p. 81.

For all of the foregoing reasons, I respectfully submit that the reciprocity issue should be left for another time and another forum, and urge that section 605(b), authorizing the FCC to impose restrictions on Canadian ownership of U.S. cable systems, be stricken from S. 2172.

Thank you for accepting my statement in the record of these proceedings.

STATEMENT OF WILLEL W. G. REITZER

The purpose of this statement is to urge the Senators of the Subcommittee, of the full committee, and of the Senate at large to incorporate an anti-obscenity provision in the bill because this is an essential feature of this legislation that should be known to all interested parties at the outset. I noticed that during the hearings there were some comments on this aspect from the witness side.

Earlier this year I was involved in the process of shaping cable TV legislation for the District of Columbia. At first the bill had no anti-obscenity provision. but I trust through citizen urging, the D.C. Council adopted an anti-obscenity amendment.

I herewith offer the subcommittee two essays written in conjuction with the D.C. Council's undertaking of local cable TV legislation.[1]

The first essay "How Much Sex and Violence on Cable TV?" points out that the potential for harm in this area is enormous and that the objections ot obscenity control are unfounded. Obscenity does cause harm, video description and depiction does invite immitation, and society does have a constitutional right "to maintain a decent society"—as the late Chief Justice Warren states.

The second essay "Indecency and the Law: Part I—Problem of Legal Philosophy" expands on the theme of the public right maintain decency, pointing out more specifically how the Supreme Court has upheld this right, particularly in the recent case *FCC.* v *Pacifica* (1978) in restraining indecency in the media.

The essays also include general guidelines as to the author's views on anti-obscenity limitation, basically that a community ought to and ought to be able to prohibit whatever it considers harmful to its overall health, safety, moral, and general wellbeing.

STATEMENT OF SUBSCRIPTION TELEVISION ASSOCIATION

Subscription Television Association, which represents every licensed supplier of subscription television ("STV") services in the United States, submits these comments in favor of the signal piracy sections of S. 2172 (§ 2 of the bill) and S. 2445 (§ 5 of the bill), both of which are substantially identical. The legislative initiatives create valuable statutory remedies whereby operators of telecommunications services would more easily be able to obtain equitable relief and monetary damages upon proving a violation of the existing Section 605 of the Communications Act (which would be redesignated as Section 705 of the Act). The two bills create no new substantive violations of the Act—they only clarify the remedies available once an operator sustains the burden of proving that some person or company has intercepted signals without authorization, or has assisted others in so doing.

This testimony first will describe the subscription television industry and the role it plays in modern video entertainment and telecommunications services. Next it will review the public policy issues which the Federal Communcations Commission has determined argue in favor of setting aside portions of the VHF/UHF spectrum for subscription services. Then it will describe which unscrupulous individuals have caused the STV industry by trading upon the good will which it has developed when these individuals sell pirate decoder boxes which allow viewers to take subscription programming without paying for it.

The STV industry has not sat on its hands waiting for Congress to pass legislation to fight these piracy activities. Indeed, STV operators have aggressively engaged in litigation to stop the signal pirates. Included in this testimony is a report on the outcome of a number of such lawsuits, which members of the industry have brought during the past two years. However, although the STV industry, with the help of MDS operators and other suppliers of telecommunications services, has established in the courts that unauthorized interception and use of subscription signals is indeed a violation of the Communications Act, service suppliers remain faced with the problem of proving damages once these violations are proved. The signal piracy sections of S. 2172 and S. 2445 address this problem, and this testimony will close with a description of how the antipiracy sections of the bills will provide practical assistance to the STV industry in future enforcement actions.

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[8] Id. at p. 80.

[1] The essays have been retained in the committee files.

ROLE OF SUBSCRIPTION TELEVISION SERVICES IN MODERN TELECOMMUNICATIONS

Subscription Television Association is a nonprofit trade association [1] consisting of companies which provide subscription television services to the public. It was formed with the goals of promoting the growth and development of STV services; representing the interests of companies providing STV services before judicial, legislative, and administrative bodies of federal, state, and local governments; gathering and disseminating data relating to the STV industry; and establishing a high level of ethical standards for companies offering STV services to the public.

The unique feature of subscription television is its ability to respond to the intense demands of small viewing audiences who are willing to pay for these services. Thus, STV is able to engage in "narrowcasting": specialized programming of unedited entertainment, sports events, cultural, educational, and children's programming. Unlike conventional, advertiser-sponsored television, STV is capable of providing video services without the hidden costs and market anomalies inherent in the indirect financial structure of advertiser-supported broadcasting.

Subscription television services constitute one segment of a group of modern telecommunications offerings known generally as "Pay TV." Other Pay TV services currently available to the public are offered by cable television over wireline facilities directly connected to the subscriber's television set, and by multipoint distribution services ("MDS"), wherein transmissions of high frequency signals are "downconverted" by appropriate equipment and displayed on a conventional television receiver. In the future, Pay TV offerings may be transmitted by low power broadcast facilities or by satellite directly to subscribers' homes. Although their methods of delivery vary, each of the Pay TV services represents an effort by the Federal Communications Commission ("FCC" or "Commission") to promote the public interest and convenience by making available sources of television programming alternative to the advertiser-sponsored television broadcasts now received by the general public.

Thirteen years after the FCC authorized the first experimental subscription television service in Hartford, Connecticut, the first commercial STV station went on the air in 1977. Today, only five years later, 28 STV stations are thriving in 22 major television markets throughout the country, placing a combined 30 million U.S. households under STV signal. Within the next two or three years 11 more operations are expected to go on the air, and by the latter part of this decade as many as 67 STV stations may be operating across the United States, reaching nearly 45 million households, or more than half of all households in America.

During STV's brief existence viewership has grown to over 1.5 million households. Industry analysts now are predicting that by 1985 nearly 5 million American homes will be subscribing to STV services and generating approximately $1.2 billion in annual revenues for the industry. In addition, hundreds of millions of dollars will be earned, and thousands of jobs created, by the many American industries which serve and support STV operations, including decoder, cable, and antenna manufacturing; installation and maintenance services; and video programming.

Management of an STV franchise requires substantial financial outlay and business experience. A typical STV business involves a franchisee who purchases broadcast time from a UHF or VHF licensee, obtains appealing programming from various sources, solicits subscribers through advertising or other promotional activities, and rents and maintains decoder equipment to the subscribing public. The franchisee and licensee are not necessarily identical, and the licensee is required to provide a minimum amount of unscrambled "conventional" programming each week. The franchisee encodes its signals by various means ("scrambling"), and realizes financial return solely from program rental payments made by authorized subscribers.

Operators must purchase decoders and other equipment which meet the rigorous engineering criteria imposed by the Federal Communications Commission. Because FCC regulations prohibit STV operators from selling decoders, however, the capital investment sunk into them cannot be recovered for years. Decoders are installed in homes throughout the community by a fleet of service representatives using trucks and electronic test equipment; thereafter those decoders must be serviced by the franchisee and maintained in first class working order.

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[1] STVA was incorporated in the District of Columbia on May 16, 1980. It has been granted exemption from Federal income tax under section 501(c)(6) of the Internal Revenue Code of 1954, as amended.

An STV franchisee's ability to operate its business in accordance with public policy and to continue offering valuable programming to its subscribers is dependent exclusively upon revenues derived from program and decoder rentals. To the extent that such rental income is siphoned away by pirates trading upon the good will and interest generated by a franchisee's promotional campaigns, the franchisee may be forced to degrade the services it offers its legitimate subscribers, to transmit less desirable programming across the airways, and ultimately may be forced to suspend operations. Such a result could leave the public with no alternative to the vast wasteland of soap operas, sitcoms, and puerile game shows which are the fare of advertiser-sponsored television.

A dozen different encoding devices have been approved by the Commission and vary in complexity, security, and cost. Unfortunately, because UHF signals are transmitted in analog, rather than digital format, it is possible for ingenious individuals to reverse-engineer even the most complex decoder. Other security measures are taken, including the use of serial numbers, color codes, "need to know" engineering restrictions, etc. However, the understandable desire of subscribers to reduce their charges, coupled with the urge of certain unscrupulous individuals to get something for nothing, has led to an organized effort in various localities whereby unauthorized decoders are marketed widely, and persons not intended by the STV franchisee to receive intelligible signals nevertheless are obtaining the same, in violation of Section 605 of the Act. Such activity is contrary to the policy of the FCC, detrimental to the interest on the vast majority of honest members of the public, and a threat to the very financial existence of the STV industry.

SUBSCRIPTION TELEVISION SERVICES PROMOTE PUBLIC POLICY AND SHOULD BE PROTECTED FROM UNAUTHORIZED PIRACY

As a matter of public policy, the Federal Communications Commission has found that subscription television services fulfill a public need by making available programming that otherwise would not be offered in advertiser-sponsored television broadcasts. The FCC's position in this regard should be of interest to this Committee, because Congress has delegated to the Commission the task of regulating the public airwaves in the public interest. Certain persons claim that because the airwaves belong to the public, anything placed upon them is free for anyone to use for his own personal benefit. Such an interpretation misconstrues the intent of Congress when it established their federal regulatory structure dealing with telecommunications.

When Congress passed the first federal Radio Act in 1912, was dealing with the problem of allocating scarce natural resources, namely the telecommunications spectrum. Although television was but a gleam in some entrepreneur's eye at that time, the problem of competing radio stations had become acute, with different stations attempting to dominate the same radio frequencies and conducting unrestricted warfare against each other by powering up their broadcasts so as to drown out competitors. Congress recognized that the broadcast spectrum is a natural resource and must be regulated in such a fashion as to provide the greatest good to the largest number of people. Therefore in 1927 it established what ultimately became the Federal Communications Commission and charged it with regulating the telecommunications spectrum in the public interest.

Interestingly, the draftsmen of the Radio Act of 1927 (predecessor to the Communications Act of 1934) contemplated with approval the concept of "subscription radio." As Senator Dill remarked at the time:

"In other words, if a broadcasting station wants to select its clients by selling a certain kind of receiving set, or attachments for sets, I do not know any reason why the Congress of the United States should prevent it from engaging in that business any more than we should prevent a telephone company or movie house from preparing something and not allowing anybody to enjoy it or to hear it except by their paying a fee."[2]

Thus, there exists a long history of Congressional intent that certain communications services will be sold on a pay-as-you-use basis, in contrast to third-party sponsorship by advertisers. The earliest examples of subscription communications services, of course, were the national telephone and telegraph services. Modern day paging devices and specialized common carrier service (such as SPRINT and EXECUNET) are other examples.

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[2] 68 Cong. Rec. 2880 (1927).

The fact that the telecommunications spectrum is regulated in the public interest does not automatically require that everything placed on the airwaves is fair game for signal theft. In fact, Congress has taken steps to assure protection of communications service suppliers. In connection with establishing the federal telecommunications regulatory scheme, Congress enacted various statutes which are designed to protect entities to which the FCC assigns various parts of the communications spectrum. One of these statutes is Section 605, which makes it a violation of the Communications Act for any person not "authorized by the sender" to intercept any telecommunication and use it for his benefit.[3] In litigation which these comments shall describe later in more detail the subscription television industry has repeatedly established that Section 605 applies to its activities and accords it protection from signal pirates.

By promoting alternatives to conventional television (STV, cable television, DBS and MDS), the FCC consistently has followed regulatory policies designed to create a fertile environment from which specialized programming may spring—special interest, educational, minority, professional development, and so forth. The FCC has distinguished conventional television programming from that specialized programming available from subscription services as follows:

"It is well recognized that conventional American television today is not a classical competitive market in which the program viewer is able to directly express not only a preference but the intensity of this preference as well. Conventional television has no mechanism for responding to this intensity of demand. Advertisers rather than viewers support television programming, and they are only interested in attracting the greatest number of viewers and receive little, if any, benefit from attracting a more enthusiastic viewer. STV, on the other hand, can obtain subscribers by responding to intense demands of a small viewing group. This could bring cultural, monority-oriented, or quality children's programming fare that advertisers might find less profitable to support on conventional television. Also to be noted is STV's service to minorities on its conventional programming, as well as its potential for meeting minority needs during pay programming hours. For instance, STV Station KWHY in Los Angeles, presently carries foreign language programming for its Japanese, Korean, and Chinese communities during the station's conventional hours of operations."[4]

Under the cost per thousand economics of free TV, many specialized programs, of great interest to segments of the public, never would be shown. The Commission, however, recognizes that alternative media such as STV must be placed on a sound financial footing, and that it never has been the intent of an alternative media supplier to provide its services free of charge to the general public. Although STV may, in time, exhibit the strong economic viability now boasted by major conventional television licensees and networks, in its present circumstances it may better be analogized to the motion picture industry at its conception. The FCC has cited with approval such a parallel between these two industries, wherein the theater, like a television set, is an enclosure containing a means for exhibiting entertainment for the patron. Just as the movie projector is analogous to the signal transmitter, so does the ticket taker standing before the theater door serve the same function as a decoding device, by restricting members of the public from access to the program being exhibited.

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[3] Several of the clauses of section 605 apply to the activities of signal pirates. The statute consists of four clauses, each "complete in itself." *Weiss* v. *United States*, 308 U.S. 321, 327 (1939). The first clause deals with unauthorized divulgences by authorized recipients, and is not relevant to STV piracy. The second clause creates an offense for any unauthorized person (e.g., one not a subscriber) to "intercept any radio communication and divulge" the contents, etc. to any person. It is established that the conjunction "and" joining "intercept" and "divulge" is cumulative, *United States* v. *Butenko*, 494 F.2d 593, 600 (3d Cir.), *cert. denied* 419 U.S. 881 (1974); therefore any unauthorized interception will constitute a violation of the second clause of Section 605. *Id.* at 627 (Gibbons, J., dissenting on other grounds); *accord, United States* v. *Lane*, 514 F.2d 22 (9th Cir. 1975); *United States* v. *Sugden*, (226 F.2d 281 (9th Cir.) aff'd per curiam, 351 U.S. 916 (1955) (no proof of divulgence shown).

The third clause makes it a violation for one not entitled thereto to "receive * * * and use such communication * * * for his own benefit or for the benefit of another * * * ." Although a purist might attempt to distinguish a "reception" from an "interception," see Butenko, supra at 609 (Seitz, C. J., concurring and dissenting), to the extent one uses an "intercepted radio communication" for his own benefit, he is in violation of clause four.

Therefore, a cursory examination of the statute's elements establishes that signal pirates are in violation of clauses two, four, and possibly three, of Section 605, as it has been interpreted by the federal courts. *National Subscription Television* v. *S & H TV*, F.2d, Civil No. 80–5655 (9th Cir., filed May 7, 1981); *Chartwell Communications Group* v. *Westbrook*, 637 F.2d 459 (6th Cir. 1980); Id., Civil No. 80–1566 (6th Cir. filed Aug. 15, 1980) (emergency restraining order pending appeal); *United States* v. *Westbrook*, 502 F.Supp. 588 (E.D. Mich. 1980); *Oak Industries, Inc.* v. *Sampson*, Civ. No. 80–420 PHX VAC (D. Arizona, filed July 10, 1980) (preliminary injunction).

[4] Subscription Television Service (Docket 21502), first report and order, 46 R.R. 2d 460, 466 (1979).

In the early days of the motion picture industry, exhibitors were reluctant to build theaters because there was little entertainment available to be shown in them; on the other hand, produces were reluctant to go to the expense of filming major features because there were few theaters available. Similarly at this stage in the development of STV, it is unrealistic to expect STV service suppliers to go to the expense of obtaining transmission facilities or purchasing and leasing decoders unless they can assure themselves that they will be paid for the services they render. By the same token, it is not realistic to expect owners of special programs, such as sports events and first run movies, to license their transmission if it is likely that this intellectual property will be pirated, and royalties reflecting total viewership not paid.

Because the STV industry is not run as an eleemosynary institution, suppliers must find some source of operating funds and reasonable profit. Currently that source is the subcriber; the only alternative source is advertising, a method frowned upon by the FCC for public policy reasons. As the Commission and its reviewing court have emphasized, "free TV is not really free," [5] because the cost of advertising is passed on to the public in the form of higher prices and the quality of programming is degraded.

In opposition to the STV industry's desire to be paid for its intellectural product, some have condemned charging for its product as an attempt to obtain a "monopoly." This characterization reflects a misconception of the regulatory status of the STV industry. An STV franchisee has no monoploy over his programming; to the contrary, he may be in competition for subscriber dollars with other STV operators, advertiser-sponsored television, MDS, cable, movie theaters, and video tape retailers, all of whom may be offering the same or similar entertainment. STVA is not asking this Committee to force the public to deal only with its members to obtain desired programming. However, the STV franchisee certainly is justified in asserting that when someone uses his product, he should be paid value for his service. Without fair return, no business can stay solvent.

The Commission's public policy determinations regulating the manner by which STV operators must offer their service to the public buttresses STVA's argument that the activities of signal pirates are inimical to the public interest. Under Commission Rule 73.642(f)(3), for example, STV service providers are required to lease rather than sell their decoding equipment to subscribers.[6] Another FCC rule sets forth detailed technical and administrative standards which STV decoding equipment must meet prior to its use by the public.[7] one purpose underlying these FCC restrictions is to protect consumers from being lured into purchasing expensive decoding devices which might rapidly become obsolete and which cannot be used outside of the STV franchisee's serving area, or after the STV provider has gone out of business; as well as to ensure that the decoding devices themselves do not cause harmful interference with other radio communications services. Another purpose is to thwart piracy, which would be facilitated and even encouraged by the unrestricted movement of decoding equipment among consumers.

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[5] *National Association of Theatre Owners* v. *Federal Communications Commission*, 420 F. 2d 194, 197 (D.C. Cir. 1969), cert. denied, 379 U.S. 922 (1070); citing Subscription Television Service (Docket 11279), fourth repoort and order, 15 F.C.C. 2d 466, 548 (1968).

[6] Rule 73.642(f)(3) reads:

"Subscription television decoders shall be leased, and not sold, to subscribers.

"The Commission established the decoder lease requirement as a matter of public policy to protect the public in a new and untested environment. Eachg STV system has unique coding schemes, none are compatible, and all are evolving. Therefore, a consumer who owns a decoder cannot use this device to receive STV tansmissions from any other supplier in any other part of the country, were he to move this residence. Additionally, under the lease requirement should technological advances make it advantageous for an STV supplier to modify his system, the burden will fall upon him as the owner of the equipment also to modify the decoders. The Commission recognized that a lease requirement might mean that ultimately subscribers would pay more in rentals than is would have cost them to buy the deoding equipment toutright. On balance, however, the FCC rules that the public would be better served by leasing, in spite of the higher cost, and it recently reaffirmed that STV technology still has not reached the stage where one system can be adopted for all suppliers."

[7] Rule 73.644(b) requires, inter alia, that every STV supplier provide the FCC a complete description of the encoding and decoding equipment used in its service, as well as preliminary test data to verify that the equipment is capable of operating within the energy, frequency, and signal quality standards imposed by the Commission. STV providers also are required to prove that their decoding devices do not require internal modification of the subscriber's television receiver, and that the devices do not interfere with the reception of conventional television, subscription television, or other delicate consumer electronic equipment.

Section 605's statutory prohibition of unauthorized signal interception, coupled with the FCC's public policy determinations promoting STV on a viable commercial basis, have convinced the federal courts that existing law protects the STV service supplier from the underhanded activities of signal pirates. Our litigative path to this conclusion has been hard-fought, and is the reason the legislative proposals under consideration now can be narrowly written to deal only with remedial matters.

SIGNAL PIRATES THREATEN THE EXISTENCE OF THE STV INDUSTRY AND ENDANGER THE VIEWING PUBLIC

Although the most obvious damage done by signal pirates is their siphoning away of potential subscriber revenues, pirates' illegal activities have many other adverse effects. As will be described in this part of the testimony, pirate decoder boxes pose a physical danger to the viewing public, make it more difficult to obtain quality programming for legitimate subscribers, deter public acceptance of subscription television services generally, and subvert the economic underpinning of the STV industry.

Every time a signal pirate places an unauthorized decoder box into the hands of a video consumer, that family is lost forever as a potential subscriber to legitimate STV services. Because monthly subscription revenues constitute the sole source of income to STV service providers, the activities of signal pirates strike directly at the economic bloodstream of our industry. The public may not realize that most of the monthly fee we charge to subscribe to STV is not allocated to the decoder boxes—rather it goes to pay for the programming which viewers find so valuable. Whenever an individual makes use of an unauthorized decoder box, he is not playing some cat-and-mouse game to put one over on our companies; rather, in very stark terms, he is stealing the intellectual property which we hold out for sale to honest members of the public.

It is impossible to tell with any kind of certainty how widespread pirate activities are in dollar terms. We have located warehouses containing thousands of decoder boxes for shipment throughout the United States. Newspapers are rife with advertising promoting pirate decoder boxes which will allow reception of local STV broadcasts; it seems that as fast as we are able to stamp out fly-by-night operators, they spring up elsewhere in our communities. At this time we estimate that well over 100,000 unauthorized decoder boxes have passed into public hands. At a $20 per month subscription fee, typical in the industry, these boxes represent tens of millions of dollars of subscription fees being siphoned away and unavailable for honest uses.

The difficulty in giving this Committee specific figures of the intensity of pirate activity is magnified whenever we bring a lawsuit against some pirate distributor. Because these illegal operators maintain virtually no records (in addition to stealing our property they also are cheating the public of tax dollars on their illegal profits), it is virtually impossible to prove with the certainty required by a law court exactly what revenue damage they have caused us. Our experience shows that whenever large-scale operators are enjoined from activities within a community, the attendant publicity causes our subscriptions to take a substantial leap, only to be diluted in a few months by other pirates substituting for the earlier ones. One of the great benefits of the legislative proposals is that they will allow us to obtain monetary damages against pirates without having to prove actual damages—the statutory damages provision of the bill.

A second result of the pirate activities is the danger they create to the public. Unlike legitimate decoder boxes, which must be tested and approved by the Federal Communications Commission, pirate devices are not regulated for safety or quality. Consequently, shoddily constructed electrical equipment prone to dangerous short circuits and possibly fatal shocks are being installed on family television sets within the range of inquisitive children and other persons. The radio frequency emanations which surround such equipment very well could interfere with other FCC-authorized services in homes, including radio and television, wireless burglar alarms, child monitoring services, and other public safety devices. Pirate decoders pose the potential of causing damage to the sensitive electronic elements of television sets; and, when the pirate boxes themselves break down, there is no warranty that can be enforced against some shyster operating out of a telephone booth.

As indicated earlier, almost all of the monthly subcription fee goes, not to decoder box hardware, but rather to obtaining valuable programming and other services for legitimate viewers. To the extent these revenues are siphoned away, less money is available for quality programming. Additionally, owners of quality programming are inclined to increase the per head charge they make for its use, because they know that many more househoilds will be watching their intellectual property than the subscription lists of an STV operator would indicate. We cannot argue with these owners' desire to be paid for the total use to which their programming is placed. It is ironic that the illegal activities of STV pirates not only reduce the number of dollars available to buy quality programming, but also increase its cost.

We believe that the activities of signal pirates have deterred viewer acceptance of subscription television generally. Prospective subscribers are being turned off to subscription television service by the loud public dispute which has raged over who is the legitimate person with whom the subscriber should deal. The claims of the signal pirates can only have the effect of weakening the apparent legitimacy of legal STV service suppliers. Additionally, the low quality equipment being pushed onto the street by illegal operators frequently provides mediocre reception quality and maintenance problems. As consumers tell each other about bad reception and poor maintenance, they rarely point out that they are using illegal equipment. As a result, in communities where shoddy decoder boxes have been distributed, STV operators are left with the onus of the pirates' bad business practices.

Finally, organized piracy has had an adverse effect on our industry's efforts to obtain conventional financing for our business operations. Banks and other conventional financial institutions are reluctant to give extensive credit to new industries, pending proof that they can survive in the marketplace. In the case of subscription television services, the unsettled status of the pirate operators has delayed conventional financing and stock underwriting of our activities far longer than should have been the case, had we not been competing with fly-by-night quick buck artists. Now that the applicability of Section 605 to signal piracy has been established in the courts, these questions are gone; nevertheless, conventional financial markets still pose unanswered questions whether our industry can effectively eradicate the signal piracy which causes such a significant drain upon our subscription revenues. Passage of the identical signal piracy sections of either S. 2172 or S. 2445 would go far to allay these nagging doubts.

Thus, the operations of a signal pirate not only drain our subscription revenues; additionally they endanger the public, degrade the quality of our programming, and call into doubt the acceptance of our industry by the geenral public and conventional financing sources. In view of the strong public policy endorsement of STV given by both the FCC and Congress, such results are adverse to the public interest. They should be dealt with by appropriate legislation and administrative action in addition to our own self-help of aggressive litigation, which will be described in the following portion of this testimony.

SUCCESSFUL LITIGATION UNDER SECTION 605

The subscription television industry does not come to this Committee asking Congress for a bail-out bill to accomplish what it should be able to do on its own. To the contrary, our industry has vigorously defended its rights in the courts and with the relevant administrative agencies. Over the past three years, the STV industry has brought civil cases resulting in four federal court opinions condemning piracy under Section 605. Other federal cases have established identical precedent for the MDS industry. Numerous state decisions, based upon local statues, have gone the same way. Additionally, in response to our urgings, a federal criminal case has ended in fines and jail terms for two signal pirates.

In five cases out of five, the federal courts are unanimous in holding that the present version of Section 605 protects STV operators from unauthorized pirating of their programs. Although two lower trial courts have taken positions contrary to our interests (based upon technicalities unrelated to the substance of Section 605), both of them have been reversed on appeal. Today there can be little question it is federal law that an unauthorized individual or wholesale manufacturer/distributor is violating the Communications Act if he distributes pirate decoder boxes or uses those boxes to intercept our programming without paying the subscription fee.

Following is a review for the benefit of the Committee the litigation which has preceded the introduction of S. 2172 and S. 2445.

On July 10, 1980, United States District Judge Valdemar A. Cordova issued a preliminary injunction against the partners of Pirate Electronics, a Phoenix manufacturing firm *(Oak Industries, Inc.* v. *Sampson).*[8] The judge ruled that Pirate Electronics' activities violate Section 605, constitute a tortious interference with STV operator Oak's prospective contractual relations, as well as unfair competition by misappropriation. Although Pirate Electronics has continued its manufacturing and distributing activities outside the Jurisdiction of the Arizona federal court, it never has challenged the July injunction, and does not presently do business in the State of Arizona.

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[8] Civil No. 80-420 PHX VAC (D. Ariz., filed July 10, 1980).

On August 15, 1980, Judge Cornelia G. Kennedy ruled the STV is not intended for the use of the General public, but only for the use of paying customers, as she handed down an injunction against two Detroit pirates *(Chartwell Communications Group* v. *Westbrook).*[9] Judge Kennedy ruled that if pirates are allowed to interfere with the activities of our industry, it "would mean the demise of subscription television stations. Unless the court can protect the subscription station's monetary base, there would be no point in allowing such stations to be licensed."

In her decision, Judge Kennedy brought out the problem that the present legislation is designed to remedy—"it is difficult, if not impossible, to value the economic loss that will be suffered" by the subscription television operator if pirates' activities are allowed to continue. This is because "every time a prospective subscriber buys a pirate decoder, that person will forever be lost as a paying subscriber." In that case it was not necessary to put a dollar value on the STV operator's harm because only injunctive relief was being considered. However, the difficulty of proving monetary damages is a significant one, and it is addressed by the proposed legislation.

On December 8, 1980, federal Judge Patricia J. Boyle rejected the Detroit pirates' argument that their activities did not constitute criminal conduct *(United States* v. *Westbrook).*[10] In this case, the U.S. Attorney had brought criminal charges against the Detroit pirates who were the defendants in the earlier decision by Judge Kennedy. The indictment charged a conspiracy not only to violate Section 605, but additionally to violate the FCC regulations described above—prohibiting STV operators from selling decoder boxes and requiring that various technical and safety standards be compiled with in connection with the provision of decoder boxes. The two Detroit pirates subsequently pleaded nolo contendere to the charges and were sentenced to jail terms and fines for their activities.

Less that two weeks after the criminal case was decided, another decision was rendered in the Detroit civil case, *Chartwell Communications Group.* v. *Westbrook.*[11] Here the federal appellate court ruled that pirates who sell decoder boxes or decoder schematics "are assisting third parties in receiving communications to which they are not entitled." Pointing to the "dual nature of STV," the court explained that while STV signals may be available to the general public in scrambled form, they are "intended for the exclusive use of paying subscribers" in decoded form. Following this decision, the Detroit pirates gave up their fight and agreed to a permanent injunction against all future pirating activities.

A federal case dealing with subscription television piracy was decided May 7, 1981, in California *(National Subscription Television* v. *S&H TV).*[12] The Ninth Circuit Court of Appeals ruled that pirate activities "threaten the economic viability of the STV industries," because if STV operators cannot control public viewing of their signal, their income is reduced and they are unable to obtain the attractive programming necessary for continued viewer subscription and capital investment. In this Los Angeles case, the federal appellate court came to grips with the argument that the airwaves are a public resource and, therefore, anyone in the viewing public, authorized or not, supposedly should be able to take whatever he or she finds. In rejecting that argument the Ninth Circuit ruled, "although the public owns the airways, Congress and the FCC are charged with regulating them in the public interest. That interest would seemingly not be served by the demise of a product for which there is clearly considerable consumer demand."

Two recent cases were decided in the last few months by federal trial courts in New York.[13] In granting injunctions on behalf of Home Box Office against various signal pirates, both courts adopted the logic used by STVA in its 1980 Amicus briefs to hold that transmissions fall within the protection of Section 605 of the Communications Act because they are not "broadcast to the general public." The courts rejected the pirates' contention that HBO's signals are intended to be received by the general public because they are not scrambled. The court explained, "the mere availability of HBO's programming to the general public does not evince an intent to allow the public at large to use this service without paying for it . . . 605 goes to the intent of the transmitter, not to the nature of what is transmitted."

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[9] Civil 80-1566 (5th Cir., filed Aug. 15, 1980), continued Sept. 15, 1980, aff'd 637 F.2d 459 (6th Cir. 1980).

[10] 502 F.Supp. 588 (E.D. Mich., 1980).

[11] 637 F.2d 459 (6th Cir. 1980).

[12] Civ. No. 80-5655 (9th Cir., filed May 7, 1981).

[13] *Home Box Office, Inc.* v. *Advanced Consumer Technology,* 81 Civ. 559 (ADS) (SD) NY, filed Nov. 4, 1981); *Home Box Office* v *Lebensfeld,* 82-C-196 (ED NY, filed Mar. 17, 1982).

The Federal Communications Commission has taken a position entirely consistent with that of the courts. On August 15, 1980 the FCC issued a Public Notice cautioning manufacturers and sellers of nonapproved STV decoders that unless these devices are given Commission approval, the manufacture, import, sale, offer for sale, shipment or use of such decoders will constitute a violation of the Communications Act and subject any person so engaged to the penal provision of Title V of the Act. The Commission noted that in its regulatory judgment, decoder boxes are merely one part of a "complete communication system required to be approved" by the FCC prior to manufacture, import, or sale in connection with STV service. The Commission has subsequently approved the outcome of the federal litigation described above in correspondence.

In view of the success which our industry has had in combating subscription television pirates through application of Section 605, we do not feel that any modification of the existing substantive statutory language is necessary. However, as pointed out by Judge Kennedy in her Detroit decision, the litigator's task is not complete once he has proven that a pirate is violating the Communications Act. In order to obtain damages from these pirates, and thus make the STV operator whole, it is necessary to prove exactly what those damages are. This is an extraordinarily difficult task, because it is difficult to determine whether persons purchasing pirate boxes would have otherwise subscribed, how long they might have subscribed, and whether additional members of the public, seeing the conflicting charges raised by legitimate operators and pirates, may have been antagonized by the brouhaha and not go into the market at all. As will be set out in the final portion of this testimony, both legislative proposals are designed to address exactly this problem of establishing remedies after we successfully have proven a violation of Section 605.

HOW THE LEGISLATION WILL IMPROVE SECTION 605

In view of the success the STV industry has had in enforcing Section 605 against signal pirates, STVA believes that any substantive additions to the Communications Act dealing with signal piracy would be cumulative to the existing statute. As a practical matter, however, the STV industry would be aided greatly by clarification of the remedies available to private litigants once a violation of Section 605 has been proven in court. We support the signal piracy sections of S. 2172 and S. 2445 because they set forth a series of remedies and penalties which can easily be brought into play once a violation of existing Section 605 has been established.

Neither bill would change any of the substantive factors relating to unauthorized interception of signals, whether transmitted through the air, along wirelines, or via satellite. We feel there is no need for further tinkering with these provisions, because a long series of court and administrative decisions provide all the interpretations necessary to snare signal pirates, wiretappers, and others operating outside the law. The only effect of the legislation would be to specify the limits of remedies available both to private litigants and to the government in enforcing Section 705 (renumbered from old Section 605) against unauthorized interception of all forms of telecommunication.

The language and approach of these bills is essentially identical to that taken in Chapter 5 of the Copyright Act, 17 U.S.C. §§ 502, 504-507. In accord with those provisions, the legislation establishes relief and creates a choice of actual or statutory damages for parties harmed by violations of new Section 705. Acts which are committed willfully and for commercial gain are subject to an additional damages provision; on the other hand, where the violator was not aware and had no reason to believe that his act constituted a violation, the court is given discretion to reduce the penalty. Criminal penalties are established. In cases where the violator is not operating for purposes of commercial advantage or private financial gain, the penalties are substantially reduced from those provided by Title V of the Communications Act; on the other hand, where commercial advantage is involved (notably the actions of manufacturers and distributors of decoding boxes) the statutory damages for criminal violations are increased over those of Title V. In certain circumstances, attorneys fees are awarded to the prevailing party. A three-year statute of limitations is established for all actions.

In view of the extended debate which occurred when the new Copyright Act was passed, we feel that Congress had had ample opportunity to explore the ramifications of various penalties for the theft of intellectual property, and that the approach taken here is consistent with congressional intent in previous legislation.

The signal piracy sections of S. 2172 and S. 2445 differ only by S. 2445's addition of a subsection (b) to new Section 705 which would apply to cable interceptions. The identical provision occurs in S. 2172 as Section 612(a) of new Title VI. STVA takes no position on this portion of the bill, other than to urge that all telecommunications media be accorded equal protection from signal pirates. In the analysis that follows, STVA references the proposed new subsections of Section 705 first by the S. 2172 designation, then by the S. 2445 designation (e.g., Subsection (b) under S. 2172 becomes Subsection (c) under S. 2445; therefore the provision is analyzed as Subsection (b)/(c)).

Section (b)/(c) of Section 705, as amended, would provide injunctive relief similar to that obtained in the STV litigation described previously. The new Subsection (b)/(c) would make it clear that relief is available to private parties, an issue which has been litigated in the past. Such an action could be commenced in any federal court without regard to the amount in controversy, thus clarifying the existence of federal jurisdiction in these cases.

Subsection (c)/(d) sets out monetary damages available to private litigants under Section 705. A litigant would have a choice of actual or statutory damages. If the litigant elected to request actual damages, the burden of proof would be made more reasonable, given the fly-by-night nature of most signal pirates, whose records are virtually impossible to obtain. On the other hand, if a litigant did not wish to expend the considerable effort required to prove actual damages, he would have the option of requesting statutory damages, to be determined by a court. The range of damages in such case would be from $250 to $10,000, depending upon the facts and circumstances of the case.

If a party elects statutory damages, and further proves that the violation of Section 705 was committed both willfully and for purposes of commercial advantage or private financial gain, the range of statutory damages could be increased to as high as $50,000, once again at the discretion of the court. On the other hand, if the person violating Section 705 is able to convince the court that he was not aware that his actions constituted such a violation, the court is given the discretion to reduce the award of statutory damages to as low as $100.

Subsection (d)/(e) sets out criminal penalties for violations of Section 705. As established in *United States* v. *Westbrook*, described previously, it already is settled that intercepting STV signals without authorization is a criminal act. Section (d)/(e) would enhance Title V of the Communications Act by providing a range of criminal penalties. These would be substantially less than those set forth in Title V in the case of a person not engaged in personal financial gain, but somewhat in excess of those normally provided by Title V for those persons engaging in wide-scale distribution of pirate decoders and other equipment. Subscription Television Association supports the inclusion of criminal penalties in Section 705 because of their strong deterrent effect.

Section (e)/(f) of the bill sets out a three year statute of limitations for any actions brought under Section 705, either civil or criminal. Our Association agrees that three years is a reasonable period. It allows ample time for a legitimate operator to determine whether undercover operators are stealing his signals and to locate them; on the other hand, it establishes a reasonable cutoff of liability for persons who were engaged in these activities at one time but who have since abandoned them.

In conclusion, the signal piracy provisions of S. 2172 and S. 2445 will supplement existing law without taking Congress into unnecessary new ground by creating new substantive statutes where none are necessary. The legislation will not create any new liabilities for violations of the Communications Act where none existed previously; it merely clarifies the remedies to be applied once violations of existing law have been proven. Subscription Television Association fully supports the signal piracy provisions of both bills and urges this Committee to report them favorably and without amendment.

STATEMENT OF THE UNITED TELEPHONE SYSTEM

Thank you for the opportunity to present this prepared testimony. The United Telephone System is vitally interested in having the ability to employ coaxial cable technology in the provision of a telecommunications services in the future and, accordingly, is opposed to any arbitrary regulatory or legislative restriction on telephone/cable cross-ownership. We have consistently advocated this position for a number of years, and I would like to explain our reasons.

UNITED TELEPHONE SYSTEM

First, I'd like to explain who we are. The "United Telephone System" (or "UTS") is a collective, administrative designation (as well as a registered servicemark) for the telephone operating subsidiaries of United Telecommunications, Inc. There are twenty-two (22) first-tier subsidiaries and four (4) second-tier subsidiaries, altogether, which provide regulated local exchange and long distance telephone service, as well as related telecommunications products and services, in generally small and rural communities throughout twenty-one (21) States. A map of the United States, with the UTS serving areas shaded, is attached hereto for the information of the Committee.

At year-end 1981, the UTS companies served 4,821,424 telephones, with 26,509 employees. Total telephone plant amounted to $5,059,130,000, and revenues were $1,639,967,000. A copy of Page 44 of United Telecommunications, Inc.'s 1981 Annual Report, showing significant UTS statistics, is also attached hereto for informational purposes. In the aggregate, the United Telephone System is the third largest telephone company in the United States. Thus, our interest in the future of telecommunications is no less significant than our current investment; indeed, as a progressive company, more.

I should also explain the nature of my Company. United Telephone System, Inc., is also a wholly-owned subsidiary of the parent company, but not an operating telephone company. It is an entity that was created in the March, 1980 reorganization of the parent's holdings into functional groups, to serve as the "flagship" of the United Telephone System. Specifically, we provide management, financial, legal, engineering, and other professional services to the UTS companies, in order to both achieve operating efficiencies and accomplish uniform policy direction. My testimony, therefore, is on behalf of the entire United Telephone System.

PROCEDURAL HISTORY OF THE CROSS-OWNERSHIP RESTRICTIONS

The current ban on telephone company ownership of cable in its service area is embodied in Part 63 of the Federal Communications Commission's (FCC) Rules (47 C.F.R. Sections 63.54–63.57). It was adopted in 1970 (Final Report and Order, 21 FCC 2d 307), and remained in effect for over a decade. As a matter of interest, I should explain that United Telecommunications, Inc., did own a subsidiary company, United Telecommunication, Inc., that provided CATV services both in and around UTS serving areas; but, all interest therein was sold prior to the adoption of the cross-ownership ban by the FCC.

On January 22, 1981, the FCC released a Notice of Proposed Rulemaking (FCC 80–780) in Docket No. 80–767, seeking public comment on a proposed relaxation of the Rules to permit an exemption for "rural areas." The FCC acknowledged that a number of significant developments in CATV had occurred since the rules were first adopted, which warranted a reassessment of their validity. Specifically, the FCC perceived an increased interest on the part of telephone companies in providing cable service in rural areas, and stated the belief that a relaxation of the restrictions would lead to increased service for which there was a demand.

UTS, in Comments filed on April 4, 1981, agreed that significant changes had occurred; but, advocated that such justified not a simple relaxation of the rules, but the elimination of the restrictions on telephone company participation in the provision of cable television services altogether. UTS also filed Reply Comments on May 6, 1981, which attempted to correct certain misrepresentations made by other commenting parties.

The FCC released its Report and Order (FCC 81–520) on November 27, 1981, in this docket, adopting an exemption for telephone companies in areas that are "rural," as defined by the U.S. Department of Commerce Census Bureau (i.e., any incorporated or unincorporated place of 2,500 inhabitants or less). Petitions for reconsideration of that order were subsequently filed by several parties, but have yet to be acted upon.

In that order, the FCC noted that its staff report on "FCC Policy on Cable Ownership" was issued on November 17, 1981; and comment thereon, specifically on the question of whether the cross-ownership rules have continued viability, was invited. UTS filed extensive Comments on January 18, 1982, again advocating elimination of the restrictions. No further action has been taken by the FCC on this matter, to our knowledge.

These regulatory developments have apparently caused the CATV industry to become concerned that their stranglehold on cable service was slipping, and they have sought legislative refuge. Despite the fact that they are purported to be pro-competitive measures, arbitrary cross-ownership prohibitions appear in Section 237 of S. 898 (passed by a vote of 90–4 by the Senate, on October 7, 1981) and Section 264 of HR 5158 (reported out of the House Subcommittee on Telecommunications, Consumer Protection, and Finance, by a vote of 15–0, on March 25, 1982). Much the same language now appears in Section 605(d) of S. 2172, the "Cable Telecommunications Act of 1982," introduced by Senator Goldwater on March 4, 1982.

UTS respectfully submits that none of these measures are founded in fact, reason, or otherwise have any rational basis.

THE REASONS FOR THE CROSS-OWNERSHIP BAN ARE NO LONGER VALID

The FCC originally imposed the cross-ownership ban for essentially three reasons; to-wit: (1) To prevent possible cross-subsidy between cable and telephone services; (2) to protect the "infant industry" of cable from telephone control in order to allow it to develop fully; and (3) to minimize problems arising from telephone companies' ability to deny access to independent cable systems through control over poles and conduits.

As UTS has repeatedly attempted to point out, in both its aforesaid April 6, 1981, and January 18, 1982, Comments to the FCC, however valid these reasons might have been in 1970, they all have been virtually eliminated by dramatic changes in communications policy, technology, and economics. In particular, the developments that have obviated the decade-old concerns are as follows:

(1) Cross-subsidies.—The concern, apparently, was the potential for violations of the antitrust laws that could occur as a result of affiliated cable operations employing revenue derived from customers of basic telephone service. In the first place, an exclusionary ban to address this potential problem is an extreme case of over-regulation. The fact is that the penalties provided in the existing antitrust laws are more than sufficient incentive to prevent telephone companies from engaging in unlawful practices.

Indeed, the FCC's November 17, 1981, Staff Study recognized that the antitrust laws represent adequate constraints on cable ownership by broadcasters, commercial networks, and multiple system operator (MSO's). Why, then, are telephone companies not similarly regarded? On what basis are telephone companies to be presumed to be more likely antitrust law violators and, therefore, required to forfeit all opportunity to participate in the cable marketplace? Certainly the facts do not justify such sanctions.

It is true that certain cable operators have attempted to severely distort the facts, however. For instance, in Comments filed April 6, 1981, with the Commission in Docket No. 80-767, the National Cable Television Association, Inc. (NCTA) and other cable concerns,[1] cited at least two cases involving UTS companies that purportedly demonstrated unlawful monopolistic practices. Yet, UTS, in its Reply filed May 6, 1981, clearly showed that said citations were improper and alarmingly deceptive. In particular, NCTA referred to the case of Warrensburg Cable, Inc., 48 FCC 2d 910 (1973), which was only the Administrative Law Judge's Initial Decision; which NCTA failed to reveal, was overturned by Memorandum (Opinion and Order, 67 FCC 2d 662 (1978). Indeed, the Commission ultimately found that the Company's conduct was not improper, it did not violate any existing law or orders, its policy vis-a-vis CATV operators was not discriminatory but motivated by legitimate business concerns, and no restraining order or monetary damages were warranted.

In view of such misrepresentations by these cable operators, UTS submits that their credibility on this issue is at best suspect, and at least cannot properly be employed as justification for the retention of the cross-ownership ban.

(2) "Infant industry".—There can be no doubt that the cable industry has fully matured in the decade since the cross-ownership rules were adopted. In 1970, there were 2,500 operating cable systems serving 4.5 million subscribers.[2] In 1980, there were 4,200 systems serving nearly 16 million subscribers.[3] Currently, 40 percent of all U.S. homes are passed by cable systems.[4] The three largest MSO's serve more homes than all but the four largest Independent telephone companies.[5] Most major

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[1] Including Arizona Cable Television Association, Teleprompter Corp., American Cable Television, Inc., and TeleCommunications, Inc.

[2] "Cable and Station Coverage Atlas," 1980–81 (Television Digest, Inc.) (hereinafter cited as "Cable Atlas"), at 12a.

[3] Id.

[4] Analysis prepared by the Research Department of Scherck, Stein and Franc, Inc. (January 9, 1981), at 3.

[5] See "Cable Atlas," at 4a, and "Phone Facts '79" (U.S. Independent Telephone Association), at 16. This comparison understates the case, since the cable system figures denote number of homes served, while the telephone company figures show number of telephones in service (considerably more than the number of customer locations).

metropolitan areas have either recently granted cable franchises or are in the process of franchising.

On February 1, 1982, the FCC released 1980 financial data based on the reported results of the cable industry's operations. Operating revenue totaled over $2.2 billion, with an operating margin of 35.7 percent before fixed expenses. Net income before taxes was approximately $168 million, and total assets had a book value of $4.44 billion. These figures dwarf the operating results of most telephone companies.

The size of the cable industry cannot in any fashion justify further protective, especially extreme, regulatory restrictions on potential competition; the present ban serves today to only perpetuate an unfair advantage for the large cable operators.

(3) Pole attachments.—The Pole Attachment Law[6] and the FCC's regulations[7] provide cable systems with adequate protection against possible abuses by telephone companies—protection which the cable industry was not afforded in 1970. Through these means, a mechanism has been created to detect any discrimination in rates charged to nonaffiliated cable companies for pole attachment rights. Thus, while UTS is yet to be convinced of the need for federal regulation in this area, it nevertheless is clear that adequate law now exists and further regulatory restraint is unnecessary.

The FCC's November 17, 1981, Study also notes that the cross-ownership rules were based on the fear that telephone company provision of cable service would somehow constrain the development of cable services that could be directly competitive with services offered by telephone companies. This fear has proved to be groundless. In fact, in the competitive environment which now exists, the restriction on telephone company entry into the cable television market actually restrains rather than promotes competition. The ban on telephone company provision of cable serves to protect the cable industry from competition and deny consumers an alternative service. Cable companies and telephone companies can and should compete in the same market, offering consumers a wide range of services. UTS does not seek to restrict the range of services offered by cable companies; but, submits that new and innovative services will be developed more rapidly if competition is allowed to prevail, than if the exclusionary rules remain in effect.

THE ECONOMIC ADVANTAGES OF CROSS OWNERSHIP FAR OUTWEIGH ANY DISADVANTAGES

There are several real advantages to cross-ownership of cable facilities by telephone companies, most of them were recognized in the FCC's November 17, 1981, Study.[8] In short, they are: Economies in construction can be realized by lashing together coaxial cable and paired wire; economies in repair and other work can be achieved through coordination; common conduits and poles can be used to provide cable and telephone services, to achieve both planning and construction economies; labor can be effectively utilized if cable hookups and telephone attachments are provided by a single crew; simultaneous repair or restoral of both telephone and cable service will result in maintenance efficiencies; fixed administrative and overhead costs can be spread over a larger base; combined operations would justify the employment of specialists that neither company could afford on its own; joint management and entrepreneurial skills can be more fully utilized; telephone involvement in cable provision can result in service being extended to new areas faster, thereby achieving a real social savings; telephone companies typically have better access to capital than do cable companies; telephone companies' knowledge about consumers' demographic, financial and geographic patterns enable them to introduce service more rapidly than cable companies, which allows real cost savings; telephone companies have extensive engineering know-how, which can be applied to cable, thereby leading to technological advances; a cross-owned system would have more incentives to innovate because it could fully utilize new techniques developed in either service, which has great long run significance for consumer welfare.

In this regard, as even the FCC's Study (at page 152) noted, cost economies should not need to be proven as a condition for cross-ownership; instead, the market should be relied on unless such will produce problems that cannot be resolved without governmental interference.

Perhaps more importantly, is the fact that our society preserves a bias in favor of allowing firms or individuals to enter any markets they wish. As was succinctly stated by Bernard Wunder, Chief of the National Telecommunications & Information Administration (NTIA), at a recent Harvard University seminar:

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[6] Communications Act Amendments of 1978 (Public Law 95-234), approved Feb. 21, 1978.

[7] CC Docket No. 78-144, First Report and Order, 68 FCC 2d, 1585 (1978) Memorandum Opinion and Order, 72 FCC 2d 59 (1979), Reconsideration, 77 FCC 2d 187 (1980).

[8] Part III, chapter 8, section B, pp. 144-152.

"It is one of the ironies that in trying to pass regulatory reform legislation aimed at breaking down some of the artificial barriers to full and fair competition, Congress seems prone to erecting surrogate legislative barriers to new entry, particularly new and competitive entry by AT&T . . . Conventional First Amendment analysis teaches that when it comes to information services, more is not bad—it is better. From this standpoint, it is hard to see how the public could be harmed by allowing for more entry into this field."

As to possible disadvantages to telephone company cross-ownership of cable facilities, UTS believes there are very few. Indeed, the FCC's Study could enumerate only four, to-wit:

(1) Cross-ownership may allow a telephone company to partially avoid rate-of-return regulation on its telephone service, by attributing costs to the regulated telephone division and revenues to an unregulated cable division;

(2) Telephone companies may be able to forestall facilities-based competition that could be provided by cable service;

(3) The size of some telephone companies relative to the cable industry could allow one or two telephone companies to gain a very large share of the national market in cable; and

(4) Unrestricted control over cable access to conduit and pole space can give a telephone company a powerful lever to gain control of a cable system or to charge monopolistic rates.

UTS respectfully submits that none of these concerns are meritorious; and, in fact, any disadvantage of cross-ownership have already been adequately addressed by both regulatory and market forces. In support of this position, we offer the following:

(1) Rate-of-return regulation.—It is unreasonable to assume that telephone rate regulation is inadequate to prevent arbitrary and monopolistic attribution of costs and revenues between regulated and unregulated operations. In the first place, it has been UTS's experience that State Commissions are so thorough, professional, and innovative in their scrutiny of the costs underlying rate filings that even the most indirect and inadvertent allocation cannot escape their attention. In other words, it is absolute fiction to presume that State regulators are not protecting local ratepayers at every opportunity, sometimes even to the detriment of a regulated utility's investors.

Second, if not more important, it is incongruous to believe that existing federal antitrust laws are insufficient to discourage improper cross-subsidies between monopoly and competitive endeavors. Beside telephone companies' predispositon to obey the law of the land, the Antitrust Procedures and Penalties Act of 1974 (15 U.S.C. Sections 1, et seq.) provides powerful incentive to all corporations and individuals to avoid violations. In that regard, again, we find it difficult to understand why the FCC's Study can recommend that reliance on enforcement of the antitrust laws is a sufficient alternate remedy to comprehensive prohibitions for broadcasters, networks, and MSO's; but not telephone companies.

There, simply, can be no justifiable basis for treating telephone companies differently with respect to the provision of competitive cable services; indeed, the cross-ownership prohibition works to reduce competition.

(2) Facilities-based competition.—The FCC's Study expresses concern that telephone companies may seek to prevent cable operators from providing alarm systems, data transmission, meter reading and even "plain old telephone service", (p. 153). Further, the FCC's Study concludes that the motive of a telephone company to "behave as a monopolist" is to prevent circumvention of the "traditional bottleneck" in local loop facilities, (pp. 159–160). Such reasoning is, at best, circuitous considering actual facts.

The provision of local exchange communications service is competitive (although telephone service remains regulated). Customers today have a multitude of options to communicate with one another locally, and technological advances are broadening the spectrum almost daily. Besides cable, there is microwave, satellite, cellular, MDS, DTS and electronic postal service, not to mention the more traditional forms of mail, telegraph and other means of personal communications. Telephone companies can gain no advantage by attempting to stifle this influx of competition; indeed, they (as well as all other providers of local communications) can greatly benefit from the technological advances that healthy competition breeds. Telephone service, after all, must be responsive to customer demands and desires in order to continue to be profitable, just as any other capitalistic endeavor. Thus, it is unrealistic to assume that telephone companies are interested in preserving the past.

Moreover, if it is true that telephone companies' local loop facilities constitute a "bottleneck", then it makes no sense whatsoever for them to deny themselves the advances in technology that can alleviate the problem. The fact is that the telephone industry is one of history's greatest innovators, and it is only arbitrary and unnecessary regulation (such as cross-ownership prohibitions) that has prevented further and faster technological advances. It is counterproductive, in other words, to preclude telephone companies from entering a related business that holds great promise for joint achievements, to the ultimate benefit of the consuming public.

The effect on the customer, in the final analysis, must be determinative of whether competition has produced the desired benefits. There can be no doubt, in that respect, that foreclosing a qualified and competent competitor, such as a telephone company, from entering the cable market will serve only to lessen competition and deprive customers of the benefits thereof.

(3) Relative size of the cable industry.—The facts which prove the "maturity" of the cable industry are discussed earlier herein. The plaintive cry of the "little ole" cable operator suffering at the whim of the giant uncontrollable telephone company realistically has a very hollow ring; indeed, it is a factual misrepresentation. The national cable market is clearly dominated by a handful of MOS's, who have no basis for fear that telephone companies could appropriate an inordinate share thereof.

(4) Control over conduit and pole space.—The fact that the Pole Attachment Law (Supra) does, and has since at least 1978, provide cable operators with more than adequate protection against possible discrimination or other abuses by telephone companies, has also been discussed earlier herein. The FCC's Study recognizes this (pg. 162), but relies on the rather spurious arguments contained in NCTA's Comments (Supra). Those arguments, in any event, cannot alter the facts that the law already exists and is being actively enforced.

The essence of NCTA's arguments is that States can preempt the federal authority, and that the enforcement process is slow and therefore inadequate. In the first place, under the law States can assume jurisdiction over cable attachments only upon proper certification to the FCC that the States regulate the "rates, terms, and conditions for pole attachments" and, in so doing, also "consider the interests of the subscribers of cable television services, as well as the interests of the consumers of utility services." (See Part I, Subpart J of the FCC's Rules; particularly Section 1.1414.) It is repugnant and contrary to the concept of federalism, to argue that the States cannot adequately protect the interests of consumers, or that the federal government can always do so better.

Moreover, the NCTA contention that the slow enforcement process constitutes a barrier is equally without merit. The fact is that CATV complaints are being expeditiously processed by the FCC[9] and, in any case, the FCC rules (Section 1.1410) provide for the payment of interest on any rate refund, if appropriate. Indeed, pursuant to a FCC Public Notice released November 25, 1982, the rate of interest for pole attachment refunds from and after February 1. 1982, is 20 percent. Thus, it cannot be contested that cable operators' pecuniary interests are extremely well-protected, and that they are caused to suffer no harm in the event of the successful prosecution of a pole attachment complaint.

In summary, it is apparent that the advantages of cross-ownership are numerous and real; whereas, the disadvantages are faulty and superfluous. There does not exist today any legitimate justification for denying entry by telephone companies in any cable markets. The continuation of such a prohibition can and will serve only to eliminate needed and desirable competition.

CONCLUSIONS AND RECOMMENDATIONS

It must be recognized that all of the initial reasons and subsequent arguments for the telephone/cable corss-ownership ban are either no longer applicable or without merit in fact. Similarly, the purported disadvantages of cross-ownership are not well founded and, in any event, are clearly outweighed by the several and substantial economic advantages thereof. In short, there exists no reasonable or proper justification for continuing the cross-ownership ban. Competition in the local distribution of communications is desirable and beneficial to the public, but only so long as qualified entrants (such as telephone companies) are not arbitrarily precluded from participating in all technologies (including cable). The current cross-ownership ban serves only to carve out a virtual monopoly for the MSO's thereby lessening, if not eliminating, competition. Justice, equity, and the free enterprise system dictate that the cross-ownership ban must be removed.

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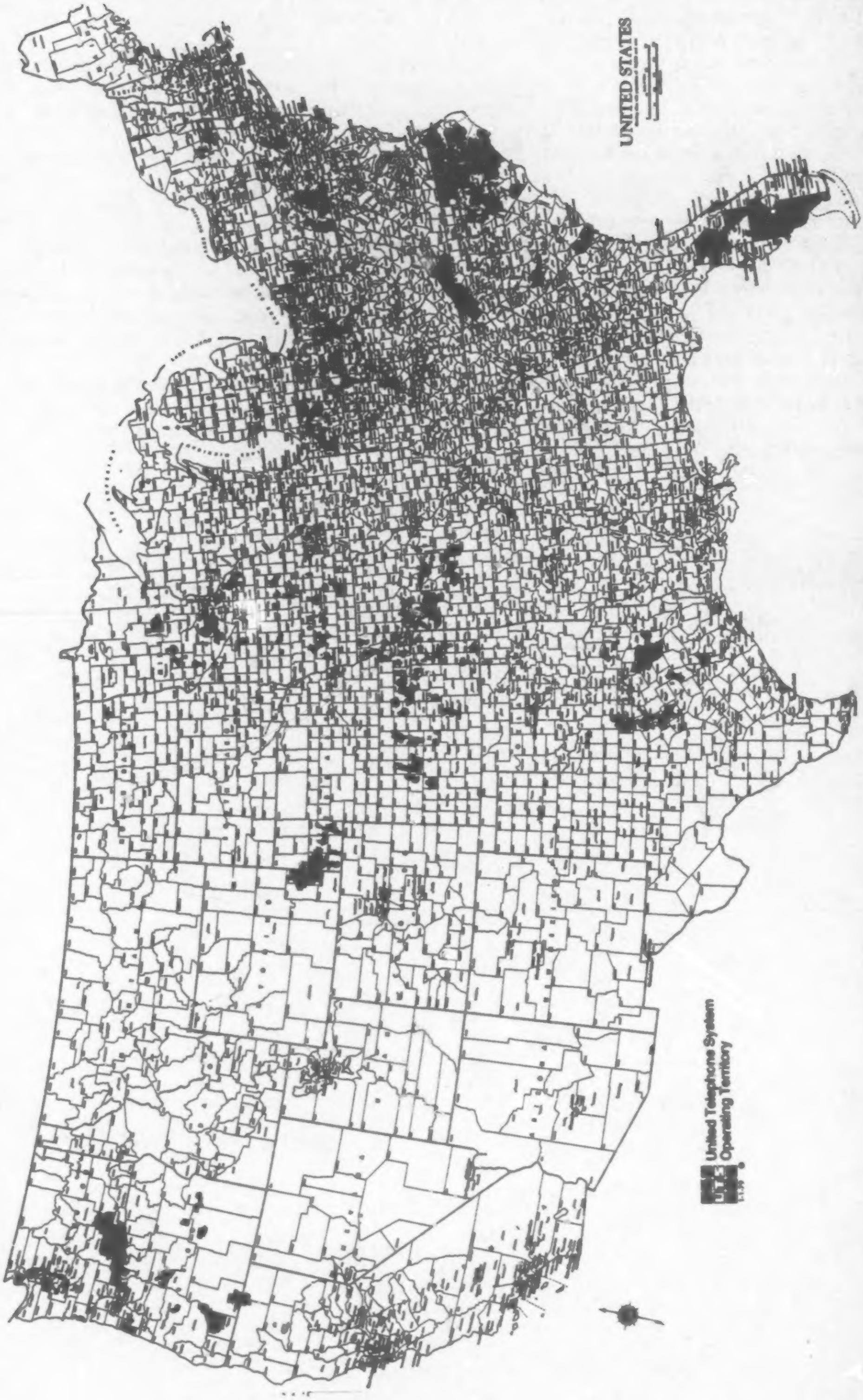
[9] See, for example, FCC File No. PA-81-0029; wherein Clear Picture, Inc. filed a complaint on June 16, 1981, United Telephone Co. of Ohio submitted its response on July 16, 1981, and the Chief of the Common Carrier Bureau issued an order on September 1, 1981; a total of 2½ months.

At the very least, we believe that the cross-ownership ban should not be memorialized in federal legislation. If, assuming arguendo, that some reason for continuing the cross-ownership ban could be justified, then the fluid and changing nature of the situation should be recognized. That is, the decision as to whether or not the cross-ownership ban should continue and for how long should be left to an agency empowered to make and change case-by-case decisions, such as the FCC.

UTS respectfully submits, in that regard, that Section 605(d) of S. 2172, if not eliminated, could be redrafted to provide that:

(d) Notwithstanding the provisions of subsection (a) of this section, the Commission shall prescribe rules governing the provision of cable services by telecommunications carriers in the same operating area. Such rules shall be designed to encourage the provision of significant additional media diversity and competition in each area. In any particular case, the Commission shall require conditions which foster the purposes and policies of this Act."

We would be pleased to work with the Committee members and their Staffs to accomplish any other appropriate legislative language to this end. We are convinced that it is in the best interests of the public and the nation. Thank you, again, for this opportunity.


UNITED STATES
UTS
United Telephone System
Operating Territory

UNITED TELECOMMUNICATIONS, INC.

1981 Subsidiary Statistics

	Revenues	Telephone Plant	Telephones	Employees
	(Thousands of Dollars)			
UNITED TELEPHONE SYSTEM, INC.—Westwood, Kansas R.H. Snedaker, President	—	—	—	551
FLORIDA GROUP—Altamonte Springs, Florida E. P. Kittinger, Chairman; J. B. Critchfield, President				
United Telephone Company of Florida	$ 174,595	$ 532,100	425,457	2,419
Florida Telephone Corporation	134,759	439,499	301,902	1,846
Winter Park Telephone Company	65,379	177,839	203,859	977
Subsidiaries: Quincy Telephone Company Orange City Telephone Company	374,733	1,149,438	931,218	5,242
CAROLINA TELEPHONE AND TELEGRAPH COMPANY— Tarboro, North Carolina, D. W. Peterson, President	303,693	984,075	1,000,417	5,358
UNITED TELEPHONE COMPANY OF OHIO— Mansfield, Ohio, C. G. Fields, President	248,516	694,304	679,474	3,983
MIDWEST GROUP—Overland Park, Kansas R. B. Cashwell, President				
United Telephone Company of Missouri	83,320	234,373	255,083	1,461
United Telephone Company of Minnesota	34,581	103,104	135,587	516
United Telephone Company of Kansas	31,371	97,016	107,684	517
United Telephone Company of Iowa	21,719	77,267	103,931	399
United Telephone Company of the West	15,462	47,302	53,040	219
United Telephone Company of Arkansas	6,964	19,362	25,100	131
	193,417	578,424	680,425	3,243
EASTERN GROUP—Carlisle, Pennsylvania L. G. Wigbels, President				
United Telephone Company of Pennsylvania	105,798	363,426	393,308	1,808
New Jersey Telephone Company	26,122	79,917	68,277	295
United Telephone Company of New Jersey	15,798	47,115	47,131	194
Hillsborough and Montgomery Telephone Company	6,055	18,026	17,302	50
West Jersey Telephone Company	5,990	18,527	15,839	80
Saltillo Telephone Company	664	3,327	4,054	—
	160,427	530,338	545,911	2,427
SOUTHEAST GROUP—Bristol, Tennessee W. W. Hill, President				
United Inter-Mountain Telephone Company	116,988	390,770	348,436	2,309
United Telephone Company of the Carolinas	29,163	102,498	90,317	327
	146,151	493,268	438,753	2,636
UNITED TELEPHONE COMPANY OF INDIANA— Warsaw, Indiana, G. L. White, President	96,497	286,753	254,410	1,421
NORTHWEST GROUP—Hood River, Oregon D. D. King, President				
United Telephone Company of the Northwest Subsidiary: California-Oregon Telephone Company	60,617	172,900	145,996	731
TEXAS GROUP—Tyler, Texas J. B. Gibson, President				
United Telephone Company of Texas Subsidiary: Palo Pinto Telephone Company	55,916	169,630	144,820	917
TOTAL UNITED TELEPHONE SYSTEM	$1,639,967	$5,059,130	4,821,424	26,509

STATEMENT OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Mr. Chairman and Members of the Committee, as President of the Motion Picture Association of America, Inc. (MPAA), I am grateful for this opportunity to comment upon S. 2172, the Cable Telecommunications Act of 1982. The positions set forth below reflect the views of MPAA and its member companies which are listed in the Appendix.

At the outset, I wish to commend Senators Goldwater and Kasten for their thoughtful effort and foresight which are so very evident in this bill. In the past 25 years the cable business has grown from a few small companies seeking to provide television reception in remote locations, to a multibillion dollar industry dominated by corporate giants which provide multiple broadband communications services from teletext to pay TV. During this period the Congress has not established a legislative policy to guide the development of cable television, leaving this task to the Federal Communications Commission which has operated, with mixed results, under the outdated Communications Act of 1934.

Clearly articulated federal legislative policy on cable television is badly needed and long overdue. Senators Goldwater and Kasten have established a foundation in S. 2172 from which such a policy can be built. Although some of its provisions may be in need of fine tuning based upon the testimony presented in these hearings, S. 2172 identifies those issues in greatest need of legislative guidance and constitutes an important step in the right direction toward enactment of a federal policy which facilitates the development of cable communications in a manner responsive to public needs and interests.

Of the many issues presented in S. 2172, one stands out in terms of its overriding importance to the U.S. program production industry. This concerns piracy of private, non-broadcast communications.

SIGNAL PIRACY

The bill deals affirmatively and, in my judgment, correctly with the avalanching growth of a shadow industry whose services to the public comprise devices to allow anyone to steal telecommunications services, particularly pay cable and pay television signals. In today's world, pirates, with more verve than Captains Kidd and Bluebeard, are the vanguard of a flourishing new industry built on the promise that what is sold in the marketplace to others is fair game for them to take for profit and personal pleasure.

The federal courts have made it clear that the unauthorized interception of pay TV signals is a violation of Section 605 of the Communications Act of 1934, and that such violation is subject to both civil and criminal penalties.

Section 2 of this bill merely specifies penalties and remedies that would be applied to the unauthorized interception of communication signals intended for the exclusive use of paying subscribers. Section 2 would replace the general sanctions provided in the Communications Act of 1934 with specific sanctions applicable to signal piracy. It is noteworthy that in some cases the sanctions provided in Section 2 would be less severe than those provided under the present law.

In essence, what this provision does is to specify in some detail the civil remedies and the criminal penalties applicable to the substantive law already in place in the statutes.

Here is what the remedies and penalties would be under this provision:

(1) Civil remedies.—

(a) Injunctive relief to prevent or restrain unauthorized interception of broadcast transmissions.

(b) An election of remedies by the injured party of either actual damages suffered by the party as a result of the violation including any profits of the violator that are attributable to the violation, or statutory damages of not less than $250 nor more than $10,000 as the court may decide.

(c) Punitive damages of up to $50,000 in the case of willful large-scale violations for commercial advantages.

(2) Criminal penalties.—

(a) Imprisonment of up to six months and fines of up to $1,000 for willful violators where there is no showing of commercial advantage or private financial gain. (Note: under current law, violators are subject to imprisonment not exceeding one year and a fine of not more than $10,000 for a first offense.)

(b) Imprisonment of up to one year and fine of up to $25,000 for commercial, for-profit offenders and up to two years and up to a $50,000 fine for subsequent offenses.

Let me review the world of electronic signal snatching. In respect to federal sanctions, we are dealing with three types of pay TV piracy: First, the illegal decoding of an STV (subscription television) signal; second, the illegal "downconverting" of an MDS signal (multipoint distribution service, the transmission of an omnidirectional signal like a broadcast signal on a frequency that cannot be received by a standard TV set); and third, the illegal reception of a satellite-borne signal that is meant solely for the use and benefit of the paying subscriber.

In the murky world of piracy, advertisements for pirating equipment and trade press reports demonstrate that as of today STV piracy represents the largest 'thieves market' with perhaps a hundred thousand or more illegal decoders in use. MDS piracy may be slightly less extensive. Satellite-to-earth station piracy, because of the relatively high cost of earth stations, is probably the least extensive with perhaps several thousand owners of such equipment.

Perhaps the most flagrant thievery in the country is practiced by a wholesaler which calls itself, lest anyone mistake its intent, Pirate Electronics. According to an owner of the business quoted in the February 1, 1980 issue of Newsweek, in one year the firm sold over 1,000 of its $275 descrambling devices to retailers across the country. ON-TV, the nation's largest STV operator, filed a lawsuit in the U.S. District Court of California seeking an injunction against individuals and retailers it charged with selling descramblers in its Los Angels market. According to the court papers in that suit, one of the defendants admitted that he sold over 4,000 decoders in Los Angeles and offered to supply one of ON-TV's employees posing as a customer 1,000 decoders on a few days notice.

Cable Satellite Systems of Sacramento, California is an MDS operator licensed to distribute Home Box Office's pay TV programs. According to its president, in 1979 pirates in the system's business area were selling 500 unauthorized descramblers a month.

The New York Post on October 3, 1980 reported that "More than 10,000 persons watched the Ali-Holmes fight on a Miami street last night—courtesy of a local engineer who pirated the satellite transmission of the closed-circuit microwaves . . . He said he is currently in the business of selling similar hookups to the public . . ."

In this subrosa world, STV signals are the hardest to protect simply because a decoder that may cost $200 is all that is required to steal STV service that costs the subscriber an average of $18 per month. MDS antennas and downconverters that pirates use cost about the same as an STV decoder. Satellite piracy requires an earth station that may cost anywhere from $3,000 to $30,000 in today's market, but those prices are coming down rapidly.

It is important to remember that we are in the midst of a technical visual revolution. Today premium program owners and distributors are being deprived of substantial revenues by pirates, but during this decade it is estimated that these losses could grow to tens of millions of dollars each year as the program snatching market increases.

There is a moral issue here, though I recognize that a good many people may find morality a tiresome subject. But it goes to the heart of the issue. This is not a consumer protection question of who is entitled to pay TV programs. We are simply talking about "old-fashioned" theft of someone else's property. Piracy is rampant in our society. It is transforming the social mores of our world. For generations we have lived by the protective maxim that when one steals something that doesn't belong to him, the law will bring him to justice. Alas, we are astounded to learn that it is not easy anymore to protect one's creative property.

Nearly 50 years ago, as the members of this Committee know, Congress wrote the connecting link to "signal snatching" in communications law. In laborious fashion, in legal actions that consume infinite time and resosurces, the pay TV industry has been dealing with the piracy contagion. I will not bore you with the details. Suffice it to say that there is an urgent need to carefully prescribe the remedies that premium program owners and distributors can pursue to protect their private property.

If the public accepts the notion that shoplifting is socially permissible, that tapping into Ma Bell's telecommunications lines is sporty, that buying electronics equipment for the sole purpose of stealing something is acceptable, if none of the above is worthy of censure, then the future of our entire creative community is in serious economic trouble. Soon we will, as a society, shrug our shoulders when anyone can utilize surveillance equipment to hear what we say in the privacy of our living, dining, or bed rooms.

The American family sets values for all of the members of the household that includes honoring of the use of pirating equipment. When the family gathers round its television set to enjoy what it has stolen from the sky or the air-waves, how is anyone to salvage virtues which are fundamental to any enduring society? If we chip away at property rights every time we consider the issue of stealing, pretty soon all of us will be buying "hot" merchandise from our local neighborhood fence.

In the real world, if piracy becomes legally permissible, the marketplace faces the dismal propsect of calamity. The "good guy" who pays his way for services rendered will become the "fall guy." The "good guy" who pays his subscription fee each month to watch premium television shows will soon begin to reason that "doing what is right" is a sucker's game. More importantly, the customers who play by the rules will end up paying more for pay TV, just like the honest customer in the supermarket must pay a hefty premium for those who shoplift and carry home what they have stolen.

As is the nature of all new intrusions, some legislators worry that this legislation might impinge on the marketplace for new technology or its legitimate use. Some are concerned that by simply specifying piracy remedies and penalties, this might shrink competition among manufacturers and distributors of electronic equipment used for legitimate reception of any telecommunications service. Let me assure you that this signal piracy provision changes not one word of the present substantive law. It does not prevent the manufacture or the sale of legitimate electronics equipment nor does it deal with the authorized reception of any television service. Legitimate manufacturers and legitimate users of electronic equipment need have no fear that they would be penalized under this law.

Moreover, contrary to some of the dire statements I have heard, there is absolutely no evidence that the legitimate activities of earth station owners or manufacturers have been restrained under the present law, nor would they be restrained under Section 2 of S. 2172. Furthermore, I am totally unaware of any legal action under current law against earth station owners who are willing to pay for the satellite services they receive. I suggest that the real objective of many of those who oppose the provision is to be excused from payment for satellite services, or to receive a government-ordered discount.

But, there is an access issue some have raised in respect to this provision that I wish to comment on. The Sophist argument propounded by some, one that Protagoras would smilingly approve, is that since STV, MDS, and satellite carriers use the public airwaves, every member of the general public, whether it is economically feasible or not, must be given access to the services delivered by telecommunications enterprises.

The access issue is a two-sided coin. It reminds me of the impoverished school teacher who was asked by a prospective rural school district employer how he taught the world, "round or flat." Eager to have the job, he replied, "I can teach it either way."

Admittedly "access" for individual users has a subtle political appeal. With respect to signal piracy, it has become the battle cry of pirates who are banded together to urge exemptions that have no logic. No one questions that STV, MDS, and satellite carriers all use the public airwaves. But, while it makes perfectly good sense to support access to communications facilities, it makes no sense to command that individual access be given to the programing which is carried over those facilities.

Introduction of the access issue in the context of signal piracy is a subterfuge and a deliberate distortion of legitimate public concerns over the use of limited communications facilities. It is an attempt to confuse access to facilities with access to the matter being communicated. Mandatory access to communications facilities may be appropriate in the case of regulated monopolies such as the telephone company. Thus, the telephone company is required by law to provide access to telephone facilities to all customers willing to pay a reasonable rate. However, mandatory access is totally inappropriate when applied to the communications carried over these facilities. Although the law requires access to telephone facilities, no one would suggest that there be an access right to the private conversations carried over those facilities. In fact the law applies harsh penalties to those who would intercept telephone messages without authorization. The law should be similarly strict with respect to other private communications, including those which involve the delivery of entertainment programs to private, authorized subscribers.

Mandatory access to subscription program services would necessarily involve the Congress or the courts in establishing "reasonable" rates and terms for these services. Such a governmental mandate would only distort the marketplace and the ability of program distributors to make intelligent judgments as to how best serve the public. There are now in advanced stages of development a number of program services seeking to provide entertainment programing to the "backyard" earth station market. Among these is the direct broadcast proposal of COMSAT. If Congress wishes to stimulate individual access to satellite services it should seek to facilitate the development of those services which seek to supply that particular market. It should not attempt to restructure existing services which were developed to supply different markets. Such governmental intrusion into private business practices is both unnecessary and inappropriate.

Finally, let me take up the proposal suggested by some that we can solve the problem by requiring that all premium telecommunications services be scrambled. Signal scrambling, without a doubt, is a marketplace approach to the protection of the signal. But, I hasten to add that it is not the solution to piracy. It is extremely costly to the distributor and the paying consumer; it often produces fuzzy pictures, and most important of all, can be deciphered and broken. The STV industry's experience with encoded signals demonstrates that scrambling is not an absolute answer to piracy. That industry scrambles its signals and requires a decoder for authorized reception, and yet today the STV industry is the most notable victim of piracy.

Today the pay TV industry desperately needs clear, unambiguous civil and criminal remedies that will permit property owners to protect their property—premium program services—against unauthorized reception.

CONCLUSION

I pray that this Committee and the Congress will set aright the all too common neglect of the belief that stealing is wrong no matter if it happens terrestrially or in the heavens.

Otherwise we shall make heroes out of common thieves even as we condemn as fools those who pay for what they use. Unless property rights are protected, revenues and the quality of premium television program will be irreparably harmed.

The Congress and the Courts have already declared that only authorized subscribers are entitled to receive pay TV signals.

Section 2 of S. 2172 prescribes in unequivocal terms what the penalties are and should be enacted by the Congress.

STATEMENT OF JOHN A. ZIEGLER, PRESIDENT, NATIONAL HOCKEY LEAGUE

Mr. Chairman and members of the Subcommittee, this statement is being submitted on behalf of the National Hockey League by John Ziegler, its president. The National Hockey League appreciates this opportunity to present its views in support of S. 2172, the Cable Telecommunications Act of 1982.

The NHL supports Section 616 of the bill. Section 616 prohibits any cable system from retransmitting into any area within fifty miles of a sports club's home stadium any games played by the home club or clubs in the same league without the home club's consent. This provision would return the NHL clubs some authority to control the use and sale of their games. The NHL supports this provision as a necessary protection to ensure the continued viability of the NHL and its clubs.

The NHL believes that the present compulsory license system, under which cable operators may expropriate games played on free television without the consent of any of the affected parties is harmful to sports, anticompetitive, and no longer warranted in today's cable television market. Section 616 is a reasonable legislative solution that offers protection to sports, cable systems and fans.

National Hockey League clubs presently rely upon two primary revenue sources, neither of which is alone sufficient to maintain a viable hockey club in today's economy. The first is fan attendance through the live home gate. The second is the logical extension of the home gate—revenue derived from local television contracts in the team's home area. The continued unfettered telecasting by cable television of hockey games into a team's home area at any time, without regard for the effect on these two revenue sources, will cause serious harm to the clubs and the league.

National Hockey League clubs play on the average to roughly 80 percent capacity in their arenas. This is the primary source the clubs have to generate income in order to pay their players' salaries and other expenses. Unfortunately, NHL clubs have no protection from the importation of over three-hundred regular season NHL games that are televised and retransmitted to distant cable systems, both regionally and nationally, often in direct competition with a home game. The importation of the panorama and excitement of outside hockey games dilutes home game attendance and threatens to erode the local basis of public support.

Both Congress and the courts have concluded that sports leagues have a right to restrict the broadcasting of league games into the home territory of a member team when that club is playing at home. Both Congress and the courts have recognized the resulting harm such competing telecasts may cause with respect to attendance and have placed limits on such broadcasts. The NHL believes that restrictions proposed by Section 616, similar to those now placed on broadcasters, should be applied to cable television systems.

The second harmful aspect of distant signal importations of hockey games is the effect such retransmitting has upon actual and potential local television revenues. The value of a local television hockey package is substantially reduced by the ability of a cable system to import other games in direct competition with the local package at a fraction of the cost the local broadcaster pays. If an NHL club is unable to deliver an exclusive television right to hockey games in an area, then the value of any package is diminished. This devalues the importance of the local television package not only from a revenue standpoint, but also from the standpoint of promoting the home club itself.

Opponents of Section 616 maintain that professional sports should have to show tangible "harm" arising from the present compulsory license system as a basis for protective measures. The NHL believes that suggestion begs a key question. Why should the NFL, or any professional sports league or club, be required to prove harm in order to enjoy the reasonable use of its own product? Indeed, why should cable television be provided the advantage it now enjoys under the system? Professional sports should enjoy the protections offered other forms of entertainment—the ability to control and sell its product in the open market for whatever someone is willing to pay.

Opponents of the limited protections offered sports by Section 616 argue the section is "anticompetitive." The NHL believes that it is the present system, which permits a cable system to use professional games for a mere token payment, that is anticompetitive. Section 616 would put competition back into the present structure by requiring cable systems to negotiate for the use of our product, just as they must do with other entertainment.

Hitherto cable television has been permitted to rebroadcast distant signals into a club's home area for virtually nothing. Whatever public policy may have formerly justified such permission has vanished. Compulsory licensing is an idea whose time has gone. Cable systems are now able and should now be required to negotiate in the market place for the right to broadcast sports events. The cable industry is no longer an orphan requiring federal protection. It is full grown and fully adopted by such large conglomerates as American Express, Warner Communications, Westinghouse, and others. Mr. Bernard Wunder, Jr., the Assistant Secretary for Communications and Information, U.S. Department of Commerce, recently described the current cable industry to this Subcommittee as follows:

"Cable television . . . enjoyed a year of substantial growth and achievement in 1981. The number of cable subscribers rose about 2.4 million, or about 60 percent more than just five years ago. Basic cable revenues were about $2 billion; pay cable revenues, derived from about 11 million subscribers, topped $1 billion. Not only was 1981 thus something of a banner year for the cable television business, but most expect the same to be true in 1982. Our forecasts call for an increase in the number of subscribers of about 2.1 million, and an increase in revenues of about $500 million.

"By 1986, we expect the number of cable subscribers to exceed 32 million, or about 40 percent of all television homes. Cable revenues in that year, counting both basic and pay, should be about $7.8 billion, or just a little shy of where the broadcast television business is today. By 1990, moreover, we forecast that more than 47 million American families will subscribe to cable television, and the business will enjoy total revenues of more than $14 billion."

In sum, cable television has come of age and the law should reflect the fact. It is more than inequitable to require a sports club, particularly hockey clubs, often marginally profitable, to continue to subsidize these large and still growing corporations.

The NHL believes the compulsory license cable presently enjoys should be abandoned and the free market allowed to prevail. The league urges the Committee's support of the limited protection offered by Section 616 of this bill, a section which restores some balance to the relationship of cable television and sports.

Thank you very much.

CITY OF ATLANTA,
Atlanta, Ga., April 18, 1982.

Senator BARRY GOLDWATER,
Washington, D.C.

DEAR SENATOR GOLDWATER: As a local elected official working actively in my city's cable franchising process during the past several years, I am interested in providing comment on "The Cable Telecommunications Act of 1982".

I commend you for initiating the discussion at the national level of the impact of cable television and of the need to clarify intergovernmental jurisdictional issues involved in the regulatory process. However, I have a number of strongly felt differences with the legislation as proposed, based on our experience in my city.

It appears to me that the national debate currently on "The New Federalism" focuses in part on the often expressed concern at the state and local levels of our governmental system that except where there are clear federal systems such as the interstate highway system or federal goals such as equal protection of our citizenry, there is often clearly a flexibility at the local level in meeting local needs that is a positive contribution to governance. It appears to me that we have been moving steadily away from heavy federal regulation towards deregulation and less federal preemption of local and state governmental action. The Cable Telecommunications Act moves backwards to heavy federal control, federal regulation, and federal preemption in a process which is working very well now at the local, municipal level. Yes, there are variations in the process now, as there should be in a nation this large and this diverse. We have the flexibility now to meet a variety of local communications needs.

In my city, the local cable franchising process (after litigation resulted in a court order to our former cable owner to divest, because of a monopoly situation) has been a positive experience, on the whole. We have had a competitive process, after deciding not to pursue municipal ownership; half our city is now wired, with the remainder in process, after only two years; we have a functioning public access system which has had the full cooperation of our cable firm; a large number of our citizens are receiving cable service. Our city has done a good job, one which would not have been improved in the least by federal intervention.

I would therefore disagree with the findings of Section 601: cable systems are not engaged in interstate commerce, but rather in intrastate commerce; the development of cable has been primarily a state and local concern, not a federal concern; the need for federal involvement is limited—we do not need a complicated federal regulatory framework for a medium that is unique and quite different, in my view from network broadcasting and common carriers. Section 601(4) assumes that variations due to different locales are "conflicting" and therefore negative and detrimental. I strongly disagree. The development of cable is occurring and occurring in a flexible, variable, and positive manner, for the most part. State and local governments should continue to develop regulatory requirements which are appropriate to the locale within the franchising process.

I also want to point out that Section 605(b) would cause great harm to my city and to several other cities. We had a competitive battle for the franchise, and the best firm won. There would have been no advantage to our citizens to exclude a firm from our neighbor, Canada, from the competition, especially since they offered a much better deal for our citizens. As we know, Section 605(b) really refers to Canadian ownership and involvement. As I understand the situation, the growth of the industry is in our nation, not in Canada, and that there is not a major rush of U.S. firms who desire to enter the Canadian market. There does appear to be some interest among U.S. firms in limiting the competition offered by Canadian firms here. We in Atlanta are interested in a competitive situation which brings the best service to our citizens. Our firm also has a number of local partners and has provided a number of local jobs, helping our local economy. They are wiring our city and providing a serious building effort when the U.S. firm which held our franchise formerly did nothing for many years! Even if trade restrictions with Canada appear wise in the future, it appears to me that the State Department, not the FCC, should have jurisdiction. I also have a very real concern about cities such as Atlanta, Los Angeles, Portland, who are in midstream with Canadian involvement which is satisfactory. I am concerned that by enacting Section 605(b), you would throw the development of our systems into chaos, at worst, and at the least into economic loss for our city and our citizens.

I have other concerns about the proposed legislation:

Section 605(C) should not condition municipal ownership on the acquisition of a cable system; it should also not be inflexible in the regulation of ways for a municipally owned system to provide programming and services, i.e.: to set up an independent board, to lease, etc.

Section 605(d) should be examined very carefully regarding the potential for decreasing competition if telephone companies are allowed to acquire existing cable systems, the potential for cross-subsidization of cable services with revenues from telephone service, etc.

Section 605(a) should not impose limitations on state and local governments in their ability to choose among different ownership structures and qualifications, which is a part of the franchising process. With this provision in effect, you would have prohibited my city from encouraging local involvement in ownership, which has been important here.

I feel strongly that Section 606 proposes an inappropriate federal role in several instances. The proposed standards in Section 606(a) should be minimum standards, with state and local governmental authority to establish additional access requirements and to establish enforcement mechanisms. This should be a local, not a federal function. Basically, Section 606(b) would effectively gut public access. It appears to me that local elected officials, not federal appointed officials, are closer to the local service area and have a closer understanding of local needs. A federal determination to "sunset" either public or leased access channels is inappropriate intrusion. In Section c, there are valid differences between leased programmers on the one hand, and educational, public and governmental programmers on the other. State and local governments should have the authority to regulate the allocation of access channels according to the local community's needs. Nondiscrimination is a valid concern of every governmental level and it is one which my city observes strictly.

Re: Section 607, state and local governments should have the authority to regulate rates. Re: Section 611, I feel strongly that state and local governments should have the right to set reasonable franchise fees without federal involvement and ceilings. Perhaps, standards to define "reasonable" would be appropriate for the federal government: ie: inclusion of comparable fees for use of rights of way by other, cost of regulation, etc., but standards, not a ceiling. And the standards should be carefully analyzed.

Re: Section 613: federal standards should not discourage innovation, as they sometimes have in other industries.

Re: Section 614: This should be limited to areas of clear federal concern.

Re: Section 615: This should provide a minimum federal requirement, allowing state and local governments to be more strict.

Re: Section 616(a): Our local stadium authority, composed of independent citizens and local elected officials, has agreements with our professional sports organizations. I would not like to see the federal government preempt our local authority's agreements re: broadcasting, since this approach has worked very well. We also have city funds paying a large debt service on our stadium, and therefore it is important that we have a local voice in this matter.

Thank you for the opportunity to comment.

Sincerely,

MARY DAVIS,
City Council, District 6.

CHERRY HILL, N.J.
April 23, 1982.

Senator BARRY GOLDWATER,
Senate Office Building,
U.S. Senate, Washington, D.C.

DEAR SENATOR GOLDWATER: I understand that you are about to begin hearings on S. 2172. While I am not familiar with the provisions of this bill, I understand that it does, in some ways, relate to the Cable TV Industry. It is for this reason that I am writing to you and asking for your consideration in exploring a problem that exists and that might be corrected with your help.

I am in the process of forming a national organization known as "Friends of C-SPAN". This organization was born as a result of a feeling of despair on the part of people throughout the country when they learned that their local cable system was dropping C-SPAN from their systems. We already have above 500 members after only three weeks of my announcement. These people are of all ages, from all walks of life and from all parts of the country. Some of the cities and towns represented are: Pueblo, Colo., Arlington, S. Dak., Shreveport, La., San Diego, Calif., Sedona, Ariz., and I could go on and on. Almost every state is represented.

As you know, C-SPAN broadcasts live coverage (gavel to gavel) of the U.S. House of Representatives. When the House is not in session, they broadcast complete, taped (but current) coverage of important Senate and House Committee hearings. In addition, their "Close-Up" series, wherein students representing High Schools from across the country meet in Washington and have an opportunity to discuss with and question important political persons on wide-ranging subjects, is most interesting as well as enlightening. These sessions show the depth of awareness, understanding and intellect of our young people. Too often we see and hear only the negative aspects of our youth.

In addition, many other notable events are carried on C-SPAN. And all of this programming is handled without editorial comment and with complete impartiality on the part of the "on air" personalities on the staff of C-SPAN.

"Friends of C-SPAN" believes that C-SPAN should be made available to every home that subscribes to a cable system. It is really our best communication link to the government. There is no other medium, be it television, newspapers or magazines where one can get, complete, uncut and unedited, a picture of the legislative process. Our objective as an organization is to work together to prevail upon every cable company to carry C-SPAN.

I think we have to ask "What is the social responsibility of a cable company to its subscribers?" When we subscribe to a local cable system, we become a captive audience. If we are not satisfied with their service, there is no competitor to whom we can turn. It seems to me, therefore, that we have a right to expect that the cable company will broadcast the best programming that is available. They certainly should be compelled to carry C-SPAN.

We have only one House of Representatives, and only one Senate. And in all of television there is only one channel dedicated completely to public service—C-SPAN. The "Friends of C-SPAN" is dedicated to assuring that everyone who subscribes to cable, will have access to this remarkable channel.

As you begin hearings on S. 2172, I would appreciate your consideration of the important part C-SPAN can play in this great democracy of ours—if the Cable Industry would begin to view C-SPAN as an important and priority part of their programming.

Sincerely,

William Harris,
Friends of C-SPAN.

City of Torrance,
Torrance, Calif., April 23, 1982.

Chairman and Members,
Subcommittee on Cable Television, Senate Committee on Commerce, Russell Building, Washington, D.C.

(Attention of Chris Coursen).

Ladies and Gentlemen: This letter is written with reference to S. 2172, the Cable Telecommunications Act, which is scheduled to be heard by your Honorable Body on April 26-28 next. The members of my City Council and I are concerned with certain features of this bill.

We believe the Committee should strike or rewrite the provision requiring public entities to buy out cable systems at not less than fair market value. (§ 605(c)). In our opinion the following changes should be considered in Section 605(c):

(a) A grandfather clause should be inserted exempting all existing franchises. We can see no good reason for the Congress to mandate the terms of "buy out" provisions, but at least it should not rewrite existing franchises.

The City of Torrance awarded a cable TV franchise to Teleprompter Corporation last month (March, 1982). A copy of the provision regarding possible acquisition of the Teleprompter system by the City is attached.[1] This provision was included in the Request for Proposals (RFP) that the City sent to the cable industry at the commencement of its franchising process. It generally received approval by the cable industry and was fair to both the City and the industry. It is unfair for the Congress to rewrite this buy-out provision by subsequent legislation.

(b) Goodwill should not be included in the computation of fair market value except under certain prescribed circumstances. As now written, Section 605(c) does not take into consideration the performance of the cable company. A cable company that is not performing its cable franchise in a satisfactory manner should not be entitled to payment for goodwill or other going concern value upon acquisition by its franchisor. The Subcommittee ought not to pass this bill until it has considered this subject in depth.

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[1] Attachments referred to have been retained in the committee files.

(c) The method of determining fair market value should be spelled out. The term "fair market value" is an amorphous concept except as it is given definition by the Federal or State Courts or in specific legislative codes. Apart from the problem of goodwill, there is a serious question whether, in determining fair market value, the value of the tangible assets should be measured by original cost, original cost depreciated, reproduction cost, reproduction cost depreciated, or some other method. In California, there has never been a satisfactory, clear-cut solution to this problem. One cannot be expected from S. 2172.

Prior to the adoption of the City of Torrance's RFP, the City Manager and City Attorney did a study of buy-out provisions. A copy of their reports is attached hereto. One can conclude from the report that this is a complex subject that is being worked out in each case by the market place without the necessity of over-protective legislation by the Congress. If a city in its RFP proposes a buy-out provision for a cable franchise that is determined by the cable companies to be unfair to them, that City will not receive many bids, viz., Tucson. I suggest that you receive testimony thereon from Harold Horn, president of Cable Television Information Center (CTIC) who probably has more knowledge on this subject than anyone in the nation.

Consequently, we request that your subcommittee delete this provision entirely from the bill or, if not, amend it as suggested above.

We are bothered by the grant of authority to the cable operator to determine the definition of "basic service" (Section 604(l). Inasmuch as a city or other franchisor's right to regulate rates, apart from access channels, is limited to basic service, it would seem prudent for the Congress to either define the term with exactitude or confer this duty on the FCC.

It can be expected that a cable operator will attempt to avoid rate regulation by interpreting basic service as narrowly as possible. If it is assumed that over-the-air broadcasts are basic service and that pay cable is not such, there is still left a whole spectrum of channels in a "no-man's land", viz. the channels received via satellite.

We further request that the Subcommittee amend S. 2172 to provide an exemption under the antitrust laws for cable TV franchising by local governments. The present system of awarding "non-exclusive" franchises to only one cable television company at a time has been placed under attack by the recent Boulder decision of the U.S. Supreme Court. This case undoubtedly is well known to all members of the subcommittee and the committee staff. It is frequently said that all this case does is declare that cities, counties, and other state subdivisions do not have immunity under the antitrust acts. This is a serious decision by itself, but it becomes more serious when viewed in the light of the District Court's opinion in that case, with which you probably are unfamiliar. If you carefully read the District Court's opinion, a copy of which is enclosed, you will see that the Court states that it will probably find that the present system of competition for franchises, as opposed to competition in the market place, to be violative of the antitrust laws.

Although it is by no means certain that this view will prevail on appeal or in the other Federal Circuits, there is no certainty that it will not prevail. In the meantime, all Cities and counties that have awarded or are awarding franchises in this traditional manner—open competitive bidding by cable companies for one franchise—are at risk under the antitrust laws. Considering the penalties of triple damages and attorney fees provided in the Clayton Act for violations of the antitrust laws, this is a serious matter. In our view, it is of overriding importance to the welfare of cable communications that such an exemption provision be included in your comprehensive cable bill.

The provision that the Commission shall establish reasonable ceilings for franchise fees (§ 611) is of concern to us. So far as we are able to ascertain, there is no demonstrated need for Congress to regulate franchise fees. The literature does not document as a case for the proposition that local governments have abused their powers in this respect. Under the principle of deregulation now espoused by the Administration and the Commission, this should be left to the States and their subdivisions. The California legislature has placed a 5 percent limit on franchise fees (Govt. Code § 53066). Research would probably reveal that this is the normal limit imposed by other states and the maximum fee imposed by franchising authorities in nearly all cases.

In any event, if the Subcommittee decides to go ahead with the bill as now written, cognizance should be taken that the Commission presently has a franchise fee limit of 3 percent of gross revenues subject to a grant of variance by the Commission to permit an additional 2 percent to cover exceptional cost of regulation and programming. A study of the Commission's records will show that few of these variances are granted. For all practical purposes, the limit is 3 percent.

It is our belief, shared by other municipal officials with whom we have discussed this issue, that the Commission in establishing the 3 percent rule has proceeded from a wrong hypothesis. So far as we are able to ascertain, the Commission believes that the franchise fee should cover only the normal cost of regulation, programming and any other expenses that a franchising authority can reasonably expect to incur as a result of establishing the cable TV system.

However, the Commission apparently has ignored recompensing cities and counties for the fair rental value of their proprietary rights in the public streets and other rights of way, which ownership rights are conferred on cable companies by the cable TV franchise. For example, electric, telephone, gas, water, oil pipe line and other utilities as well as common carriers and any private enterprise wishing to use the public rights of way of a municipal corporation must pay a franchise fee as rental for the right to use those rights of way. There is no good reason why cable companies also should not pay a reasonable rental fee to use the public rights of way in addition to any expenses that a city may have as franchising authority.

If the fair rental value of the public rights of way were considered, the franchise fee would be raised to at least 5 percent of gross revenues. However, it is not reasonable to believe that the Commission will change its 3 percent rule unless the Congress so directs. We, therefore, urge the subcommittee to amend the bill to delete the franchise fee limit entirely or to provide that such fee shall not be less than 5 percent.

Respectfully submitted,

JIM ARMSTRONG, *Mayor.*

WARREN SUPPLY CO.,
Sioux Falls, S. Dak., April 26, 1982.

Senator LARRY PRESSLER,
411 Russell Senate Building,
Washington, D.C.

DEAR SENATOR PRESSLER: I am writing to you to express my concern about a bill to regulate cable TV (S. 2172) for which the Senate Communications Committee begins hearings this week. Section 2 on page 17 of this bill raises the penalties of Section 605 of the Communications Act.

Several cable program suppliers, notably Home Box Office (HBO), are attempting to apply Section 605 to private satellite earth stations. I am sure you are aware that private satellite receiving stations are beginning to provide a wide range of television programming to many rural citizens that, heretofore, barely had one good TV station. Our Company has been engaged in selling private and commercial earth stations since August last year. Any attempt to categorize the use of these systems as illegal would jeopardize our business and adversely affect the rights of many rural South Dakotans.

I believe you should support the right of private earth stations to receive any signal for personal use for the following reasons:

1. Most private earth station owners support the ownership rights of cable program suppliers, and we have offered to pay for the signals through our Trade Organization—SPACE. So far most of the program suppliers have refused to accept payment for their signal. We feel that rural people have the same right to view the programming as do citizens served by cable.

2. The refusal of program suppliers to deal with private earth stations is anticompetitive in nature and violates the first amendment rights of rural taxpayers. How can program suppliers, using the public airways and technology developed by taxpayer dollars, exclude rural citizens?

3. As the law stands now, a person can legally receive signals from about twenty satellite channels. Some program suppliers are alleging that it would be a violation of Section 605 to merely turn the tuning dial to their signal. I think it would be a disservice to raise the penalties of 605 without resolving the "refusal to deal" question.

4. The potential for entertainment, education and communications using satellite technology is absolutely mind boggling for rural areas. Please do not allow this technology to be used exclusively by cable program suppliers for urban citizens.

I have enclosed a letter[1] written by the General Counsel of the FCC to the House subcommittee on communications. His comments are on H.R. 4727, the "Waxman

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[1] The letter and article have been retained in the committee files.

Bill". This bill seeks to make home satellite receivers illegal. Please read page 8 "Problem of Non-Commercial 'Backyard' Satellite Earth Stations". I believe Mr. Sharp generally supports my views.

Sincerely,

RALPH L. WARREN,
Executive Vice President.

WESTINGHOUSE BROADCASTING AND CABLE INC.,
New York, N.Y., May 5, 1982.

CHRISTOPHER D. COURSEN,
Communications Counsel, Committee on Commerce, Science, and Transportation,
Washington, D.C.

DEAR MR. COURSEN: We would like to again thank Senator Goldwater and the Subcommittee for giving Mr. Bresnan the opportunity to participate as a panel member last Wednesday. While Mr. Bresnan spoke on the subject of foreign ownership, the dialogue which followed his prepared comments involved a difference of opinion in the area of sports rights. Mr. Bresnan commented that the prices paid for broadcast rights to major league sports were increasing dramatically. Commissioner Kuhn asserted that these statements by Mr. Bresnan were untrue.

The purpose of this letter is to provide the Subcommittee with additional information on the subject. Mr. Bresnan's testimony was based on generally available information as well as the experience of our own broadcast stations. Enclosed is an article which appeared in the March 1, 1982 edition of Broadcasting.[1] The article reflects substantial increases in radio and television baseball rights fees. It indicates network increases of 20.3 percent in 1982 and local rights increases of 34 percent in 1982. The chart on page 48 reflects that rights fees have nearly tripled in the last decade with the most significant increase coming in the last three years, when cable penetration and the proliferation of sports on cable have increased most dramatically.

Further, the chart on page 50 makes it clear that the overall 32 percent increase in fees is realized only from radio and over-the-air broadcast TV. Not reflected in the figures are anticipated increases for national and regional pay cable services, as well as STV rights in Texas and Los Angeles. Similarly not reflected is the increase in advertising revenues experienced by those teams who retain advertising availabilities within the broadcast of their games.

The Group W experience underscores this clear trend. In San Francisco, we were paying $650,000 per year to carry the A's games in 1981 and were replaced by a television station paying approximately $1.2 million in 1982. Our Pittsburgh Pirate radio and TV contract is now being extended with rights fee increases estimated at 45 percent in 1983 over 1982. In Philadelphia, KYW-AM carried the Phillies through 1981 and we were paid $125,000 per season, with the Phillies retaining the advertising time. In 1982, we lost the contract to another radio station which will pay the Phillies more than $19 million over ten years. Our rights fee for carrying Boston Celtic basketball on WBZ-TV increases by only 10 percent over the 1981 rate through 1985; however, we gave up our exclusive broadcast rights to a regional pay cable network and will also be carrying fewer games for that fee.

I trust you will find this information useful in clarifying some of the misunderstanding which may have existed as a result of the panel on Wednesday.

Very truly yours,

HARLAN J. ROSENZWEIG,
Vice President and Chief Counsel.

GOLDEN WEST TELEPHONE COOPERATIVE, INC.,
Wall, S. Dak., May 7, 1982.

Senator LARRY PRESSLER,
U.S. Senate, Russell Senate Office Building
Washington, D.C.

DEAR SENATOR PRESSLER: Thank you for your letter of April 15, 1982. I am pleased to have an opportunity to submit written comments for the Record on S. 2172 & S. 2445, the Cable Telecommunications Act of 1982. As the manager of Golden West Telephone Cooperative, I have had considerable experience in recent years in guiding the cooperative's entry into CATV in five communities in Southwest South Dakota. My comments on the bills are based on this experience and on a lifetime spent as a resident of a rural area.

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[1] The letter and article have been retained in the committee files.

Golden West Telephone Cooperative (Golden West) is a subscriber-owned company serving telephone subscribers through 27 exchanges covering approximately 15,000 square miles, at an average density of about 1 subscriber per route-mile of telephone cable.

Golden West is a member of the National Telephone Cooperative Association (NTCA). NTCA is a national non-profit association representing about 420 small rural telephone cooperatives and locally owned and operated commercial telephone companies in over 40 states. Development of these systems has been financed largely by loan programs administered by the Rural Electrification Administration. My comments have been fully endorsed by NTCA.

In January 1981, Golden West filed an application with the Federal Communications Commission (FCC) seeking a waiver of the FCC ban on telephone companies providing CATV service in their service areas. Golden West proposed to provide CATV in five communities and their outlying rural areas in its service area, where no satellite programming was available and where off-the-air television reception was poor-to-marginal. One or two networks and PBS was as much as most residents could receive most of the time. In some cases, even a poor signal was obtained only with a rooftop antenna or a tower.

The Golden West application was not opposed, and after 6 months, the FCC waived its crossownership ban for us. Golden West is currently laying cable and hopes to begin operation of its cable subsidiary in September 1982.

Commercial cable companies showed no interest in serving this area. One of the communities which will be served by Golden West is Martin, South Dakota. The City of Martin has attempted to persuade two other commercial cable companies to provide service to citizens. Both companies declined, informing the City that since it was located in a remote area and the City itself is small, the cost of providing the service would be prohibitive. The City of Philip, South Dakota, also in our cable service area, had a similar experience when it attempted to foster commercial cable development. The mayor was informed that commercial cable service was simply not feasible in this community.

Golden West did a feasibility study of the area and found that not only would it be possible for the co-op to provide CATV service in Martin and Philip, as well as Wall, White River and New Underwood, but that the co-op also would be able to serve the less populated areas surrounding the towns.

The conventional wisdom in the cable industry holds that a subscriber density of over 40 per route mile of cable is necessary in order for a commercial CATV system to survive. As noted above, the Golden West service area is considerably less densely settled than this standard. However, we felt certain that we could provide high-quality CATV service in our area. One reason is that, as a telephone company, Golden West is accustomed to lower rates of return on its investment than are most commercial cable companies. Also, we are able to take advantage of the economy of joint management and operation of the CATV system and the telephone system. Finally, as a utility, Golden West is committed to the principle of area coverage and to providing service to sparsely settled areas as well as densely settled ones.

Based on our experience in South Dakota, I would like to comment on several provisions of S. 2172 & S. 2445 which will have an impact on rural areas. These provisions are the codification of the FCC's teleco-CATV crossownership ban, bypass of the local exchange, and signal piracy penalty provisions.

I am concerned about Section 605 of S. 2172 & S. 2445, which incorporate into Federal law the FCC administrative ban on telephone companies providing Cable television in their service areas. In my opinion, enacting such a provision will surely delay cable development in rural areas.

As you know, the FCC imposed the crossownership ban in 1970 in order to protect the infant cable television industry from unfair competition. In recent years, the FCC has devoted considerable study to the ban and its impact on rural areas. Instead of fostering CATV development in these areas, as anticipated, the ban restricted cable development by inhibiting entry by the only companies interested in serving many sparsely-settled areas, rural telephone companies. The Golden West project is an example. Many telephone companies have experienced even greater delays. In some cases, the FCC took over two years to approve a waiver. Last year, the FCC established standards to exempt rural telephone systems from the ban. The FCC is currently concluding a study of the possibility of eliminating the cross-ownership ban altogether.

I urge the Subcommittee to remove this provision from the cable legislation. It seems more sensible to await the conclusion of the FCC study before incorporating an administrative ban into Federal law.

If the subcommittee elects to retain Section 605 of S. 2172 or S. 2445 I would urge the members to consider altering the wording of the rural exemption. During the FCC debate on standards for exempting rural telephone systems from its administrative ban, several years were consumed in examining the use of subscriber density as a criterion. Density proved to be an unworkable standard and the FCC abandoned this approach in favor of a definition established by the U.S. Bureau of the Census.

The FCC defined rural areas as those areas outside of an urbanized area and containing no place with over 2,500 inhabitants. Unfortunately, this standard is extremely restrictive. It means only 700 or 800 homes passed. It still requires many telephone systems serving rural areas to obtain an FCC waiver in order to provide CATV service in their service areas. A telco who wants to serve a place of 2,502, for example, must apply for a waiver.

It is worth noting that all telephone companies, even those exempt from the cross-ownership ban under the Commission rules, must file a section 214 certificate of convenience and necessity with the FCC. These filings, which commercial cable companies are not required to make, can also be time-consuming. The same delay applies to all acquisitions by telcos in their service areas irrespective of size of communities served. I believe acquisitions should be treated just like new franchised areas and be exempt from the FCC ban.

To summarize the result of the additional administrative burden on telcos hoping to provide cable services is a delay in the availability of service to rural subscribers. The FCC recognized this fact in a Notice of Proposed Rulemaking released on January 22, 1981 (FCC Docket No. 80-767), stating:

"We believe that the service to rural areas is less likely to occur as long as our rules hold out only the possibility of grant of a waiver. . . . We believe the administrative delays attendant to obtaining waiver constitute a barrier that has prevented local telephone companies from offering, and consumers from receiving, cable television service in rural areas. . . . It is our . . . belief that the costs of these burdens in rural areas outweigh the benefits."

Perhaps the most troubling of the cable television legislation is section 609 of S. 2445 which promotes bypass of the local exchange. In the debate on telecommunications legislation much concern has been voiced about the visibility of local exchanges if cream skimming occurs. Section 609 promotes this activity by CATV operators without any obligation to provide universal telephone service. As you know Senator, the revenue pie of local exchanges is finite. If the lucrative business accounts are cream skimmed by CATV operators then local rates for basic telephone service will increase. Just how much will be in direct proportion to the cream skimming. Since CATV operators providing telephone service would not be regulated under S. 2445, there would be no way to recover a contribution to maintain universal telephone service at reasonable rates. I believe this constitutes unfair competition and is another reason why codification of the FCC cross-ownership ban should not occur.

I would also like to comment on Section 2 of both bills, which establishes full copyright liability for any business or individual who receives unauthorized signals. While I recognize that there may be some justification for penalties for unauthorized use of signals, I feel that some provision should be made for those rural areas where cable development is unlikely.

To give you an example, in one community our cable service area, a commercial cable system has been established. The commercial cable company, however, only provides service to the town. Surrounding areas are not served, and, taken alone, will never be an attractive investment for cable operators. With poor reception off-the-air, the residents of these such areas have little or no hope of receiving access to the three commercial television network signals and a public television station.

The major CATV suppliers via satellites such as HBO, ESPN and Show Time, have refused to contract for copyright liability with individuals who receive their signals on their own earth stations. Imposing the heavy fines described in Section 2 of S. 2172 on residents of very rural areas will make these individuals innocent victims of the conflict over copyright royalty payments. I urge the Subcommittee to consider the plight of these earth station owners and their suppliers, and to treat them equitably in the policy debate over copyright liability.

I hope that these comments are useful to you. I appreciate having the opportunity to provide testimony concerning S. 2172 and S. 2445.

Sincerely,

Donald Paulsen, *General Manager.*

City Council, City of Atlanta,
Atlanta, Ga., May 11, 1982.

Hon. Barry Goldwater,
Chairman, Subcommittee on Communications,
U.S. Senate, Washington, D.C.

Dear Senator Goldwater: Thank you for the opportunity to comment on S. 2172, the bill you introduced on March 4, 1982 to establish a much needed national policy on cable telecommunications. As a Council Member from Atlanta, Georgia, I endorse the April 28, 1982 statement on this legislation made to your Subcommittee by Cathy Reynolds on behalf of the National League of Cities.

What I would like to do in this letter is comment on one section of S. 2172 about which I feel particularly strongly: the "reciprocity" provisions of section 605(b). I believe that the adoption of section 605(b) would, for several reasons, be against the public interest.

First, these reciprocity provisions would eliminate the right of local franchising authorities to invite applications from Canadian and other foreign cable companies. They would thus nullify the franchisor's freedom to select a foreign-owned company even if, in its judgment, that company would render the best service. The Atlanta City Council recently granted the franchise application of Cable Atlanta, a Canadian company. We thought at the time that Cable Atlanta would provide excellent service to our community, and the ensuing months have seen the company move steadily toward fulfilling our expectations. Had the reciprocity restrictions envisaged in S. 2172 been in effect to prevent our consideration of Cable Atlanta's bid, I believe that the citizens of Atlanta would not have been well served.

Second, by restricting competition, section 605(b) would tend to deprive cities of some of the expected long-range benefits of full and open franchise competition. The more companies the cities have to choose from the better chance those cities have of receiving superior service.

Third, as best I can determine, no one would benefit from the adoption of reciprocity provisions except the few large U.S. cable companies that are bidding for the remaining U.S. franchises. Although they support section 605(b) on the ground that since Canada prohibits U.S. ownership of Canadian cable systems, we should adopt a reciprocal prohibition, what they really want is the elimination of Canadian companies with excellent service records from the franchise competition.

Fourth, there's no need for federal preemption of this area. The best information I have shows that Canadian ownership of U.S. cable systems is quite small, relatively speaking, and the projections I've seen indicate that it won't go over 5 percent in the foreseeable future. In my mind, this certainly does not constitute a threat to national security or give the federal government any other cause for concern.

In short, I believe Cable Atlanta and the other Canadian companies are on the right side of this issue and I hope you will eliminate section 605(b), or any other form reciprocity provisions, from the bill that your Subcommittee finally endorses.

Thank you again for considering my views on this important manner.

Sincerely,

Debby McCarty, *City Council Member.*

American Library Association,
Washington, D.C., May 20, 1982.

Hon. Barry Goldwater,
Chairman, Subcommittee on Communications, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

Dear Senator Goldwater: This letter is submitted on behalf of the American Library Association for the hearing record on S. 2172, the Cable Telecommunications Act of 1982, which you introduced March 4 and on which hearings were held April 26–28. This letter also makes reference to S. 2445, the Cable Telecommunications Competition and Deregulation Act of 1982, introduced by Senators Hollings and Cannon.

The American Library Association is a nonprofit educational association of almost 40,000 libraries, librarians and information specialists, library trustees, educators and communicators, and is the only nongovernmental organization at the national level representing all types of library and information services. In a 1980 publication, Video & Cable Guidelines, ALS's Library and Information Technology Association identified 264 libraries involved in video or cable television. The current president of LITA, Brigitte L. Kenney, provided considerable input to this statement.

The rationale for library involvement in cable television lies in the expanding role of libraries as informational, educational and cultural institutions. Given the complexity of society, the delivery of information is recognized as a major activity, using a variety of technologies and formats. The library's educational role lies not only in providing resources to support school and college curricula, but in literacy training, individualized learning projects, and adult and continuing education. For many communities, the public library represent the only tax supported cultural institution. Concerts, exhibitions, talks, and the whole gamut of cultural programming have been legitimate library activities for over a century.

Given libraries' expanding role but limited resources, it is not surprising that for over ten years, libraries have been using cable TV as a delivery mechanism. There is probably no more economical a method of reaching into the homes, offices, schools and other agencies of society. It requires no broadcast tower facilities. Some libraries have been able to enter CATV without any expenditure, depending upon the nature of the local franchise. Even a fully-equipped studio with every option, and capable of reaching an entire city can supplement a library sytem's delivery mechanisms at less cost than the construction, equipping and operation of one small branch library.

Library origination of local cable programming has ranged from traditional activities such as story hours and book talks to presentations of videotaped community events, speakers, discussions of critical community issues, and to video reference service in which material which could not be adequately described by phone such as maps, statistical tables and other graphic material was placed under a stationary camera.

The Santa Fe, New Mexico, public library transmits public affairs programming such as coverage of mayoral candidates and Ground Zero week activities over a public access cable channel, a particularly important function since Santa Fe does not have a local broadcast TV station. The New Mexico state library recently used cable TV facilities to participate in an ALA-sposored teleconference on marketing strategies for libraries transmitted from Denver by satellite with the assistance of the Public Service Satellite Consortium. The public library in Columbus, Ohio, participated in a joint experiment with the Online Computer Library Center (OCLC) using Warner Cable's interactive QUBE system. The experiment allowed viewers to scan an online encyclopedia, influence the discussion on a book review program, choose the next book to be reviewed, and order books to be mailed from the library to the home without ever leaving their living rooms.

Another valuable application lies in the data communications capability of cable. In Kansas City, all types of libraries have formed a consortium to use cable for information sharing over distance, for data, facsimile, visual and printed information. In Los Alamos, New Mexico, an existing coaxial cable was by far the most economical way to connect the main public library with the country's central computer in order to automate the circulation control system. In Atlanta, branch libraries are being connnected to the main library by cable for a communications capability greater, but less costly, than phone lines. Interinstitutional looping and connections among cable systems in contiguous urban areas increase the potential for data transmittal and resource sharing. In Minneapolis-St. Paul, librarians have been vocal in demanding a single regional channel for the metropolitan area so as to exchange information with each other and with other public institutions.

In Aurora, Colorado, the library administers four channels for government, educational, public access and leased use, and has a well-equipped professional TV studio furnished by the cable company. Part of the franchise fee goes for the maintenance of the studio and personnel costs. Public libraries in Atlanta, Georgia; Bloomington, Indiana; and Altoona, Pennsylvania, are examples of libraries which administer or provide all programming for a public access, governmental, educational or library cable TV channel.

While these few examples do not adequately describe the extensive involvement of libraries in the delivery of programming and information via cable television, they do give some idea of the extent of the involvement. This involvement stems from the belief that, as the delegates to the 1979 White House Conference on Library and Information Services declared, "a free, democratic society depends on a fully informed citizenry." The promotion of equal access to a diversity of information sources is a legitimate and necessary matter for national public policy.

Some provisions of both S. 2172 and S. 2445 cause us concern to the extent that they do not further this national policy. This point was made very well in the testimony before your Subcommittee on April 27 by Susan Buske, Executive Director of the National Federation of Local Cable Programmers. We wish to endorse the specific suggestions of the NFLCP on S. 2172. Many of our members who are involved in cable TV are members of or have worked with the NFLCP, whose purpose is to aid community groups in fostering citizen participation in community television and in developing creative public access programming. I will summarize their suggested amendments to S. 2172 only briefing below:

1. The bill should make an explicit finding recognizing the interest of the states as well as the federal government in regulating cable.
2. The bill should make clear that one of its purposes is to encourage development of outlets for community self-expression and promote diversity in the public's choice of programs and types of service.
3. The exclusive jurisdiction granted the FCC should be modified to provide that states and subdivisions may regulate if not inconsistent with federal law or regulation.
4. Existing franchises should be protected.
5. The definition of "basic services" in S. 2172 gives the cable operator absolute power to define basic services. "Basic services" are now defined by agreement between cable operators and franchising authorities; there seems little reason to change this arrangement. A definition of "leased channel" should be added to protect against a cable operator controlling the content of telecommunications services through a parent company or subsidiary.
6. Reasonable regulation of ownership of cable systems should be permissible by states and localities to protect the rights of citizens and consumers to obtain an information utility suited to their needs and to participate through local governmental mechanisms in its operation.
7. There is no justification for guaranteeing a cable operator who violates the terms of its franchise agreement a right to the "fair market value" of its system. The bill should permit states or localities to provide for reacquisition of the franchise under whatever terms have been fairly negotiated with the franchisee.
8. The bill should state clearly that the statutory reservation of 10 percent of channel capacity for public access and 10 percent for leased access is a minimum and not a maximum. Individual systems should remain free to negotiate for provision of additional channel capacity to meet the needs of the local service area.
9. The procedure by which the FCC can eliminate leased access requirements should be modified to take future use into consideration, to put the burden of proof in any proceeding on the party seeking to eliminate access, and to provide a corresponding procedure for reinstating access requirements.
10. The provision that access channels may be utilized by the cable operator until there is demand for them should be eliminated. Public access providers would be at a great disadvantage in attempting to implement such a provision.
11. States and localities should not be prevented from making useful and legitimate distinctions between the rates charged for use of public access channels; nor should they be prevented from requiring free access and production facilities for certain public access programmers such as schools, libraries, and nonprofit community groups.
12. States and localities should have the option to regulate leased channel rates since this may be the only way of ensuring that a wide range of potential programmers such as small businesses and community groups will have the opportunity to enter the market and provide innovative services.
13. The criminal and civil liability section could unintentionally protect an operator who knowingly or maliciously abets a libel but who may not have an economic interest in the program carried on the cable. The section should be amended slightly to prevent this.
14. The bill should include a section which provides for interconnection of cable systems. Especially in contiguous urban areas, this would allow communities to hook up with one another to share public access cablecasting facilities or to receive and exchange information.

In addition, we believe that national public policy would be served by encouraging the provision of two-way capability in all future cable systems to accommodate data communications. As S. 2445 recognizes in several of its provisions, cable systems will be used increasingly for transmission of data and information. Such services will be much more useful to consumers if they can adjust and interact with the information to meet their needs. We commend the "New and Additional Services" section of S.

2445 which encourages innovative services and presumes them to be in the public interest if technically feasible.

S. 2445 appears to retain the fairness doctrine and equal time requirements, and some cross ownership restrictions. In an ideal world, if access to the various technologies of information delivery were guaranteed, there would be no need for content regulation, and questions of multiple ownership could be handled by antitrust policies. Even with legislation which provides for a minimum of public access, we feel there requirements should not be dropped until actual experience has demonstrated that the public access principle is well established throughout the telecommunications industry.

With regard to cable legislation, we feel the most important point is ensuring public access. We strongly support the provision of S. 2172 which requires cable systems with 20 or more channels to set aside 10 percent for public, educational, and governmental use, if amended to make clear that states and localities may negotiate for additional public access capacity. The lack of a public access provision in S. 2445 is a serious defect; the provision for petitioning the FCC to obtain access to a cable operator's facilities is a most unsatisfactory substitute.

We hope these comments are helpful to the Subcommittee. They are made in the interest of protecting the diversity of information sources so essential under the First Amendment. Diversity cannot be guaranteed, we feel, if all decisions are left to marketplace forces. Diversity can be nurtured by a minimal amount of structural regulation at the federal level, and by allowing states and localities to use appropriate mechanisms to ensure that public access to the various forms of telecommunications is available to all.

We appreciate the opportunity to present the views of the American Library Association.

Sincerely,

Eileen D. Cooke,
Director, ALA Washington Office.

Mehl Cable Systems, Inc.,
Tucson, Ariz., May 24, 1982.

Senator Barry Goldwater,
Russell Senate Office Building,
Washington, D.C.

Dear Senator Goldwater: The purpose of this letter is to present the views of an Arizona telecommunications company on the proposed telecommunications legislation (S. 2172). Please enter a copy of this letter into the hearing record.

By way of background, Mehl Cable Systems, Inc. ("MCS") has offices in both Phoenix and Tucson, Arizona. MCS is owned by three Tucson residents: George Mehl, David Mehl and Gary Davidson. MCS was organized because the Mehls, who are also multiple housing developers, believed that the addition of telecommunication systems to their apartment projects would increase the desirability of the projects in the eyes of potential apartment renters and would increase the satisfaction of current residents. They investigated cable television as it relates to the multiple housing market and found that satellite or cable television is indeed a very desirable feature for multiple housing projects, but that this market is not well served by franchised cable television operators. MCS was then organized to provide quality cable television service to the high density multiple housing market.

The failure of other cable operators to serve the multiple housing market is evidenced by the fact that in the city of Tempe, Arizona, there are today 12,600 apartment units not being served by cable television. This represents 30.5 percent of Tempe's total dwellings. Furthermore, it represents 66 percent of all multiple dwelling units in the city of Tempe. This is true even though there have been years of cable construction in the city by a franchised cable operator. Because such a significant portion of the population of the city of Tempe was not being served by cable television, the city council recently voted unanimously to grant MCS a franchise to provide cable television service within the city of Tempe. It is MCS' express intent to compete with the original franchised cable operator to provide service to these underserved multiple housing units.

Because MCS specializes in the multiple housing market we have developed the special expertise needed to adequately serve the residents of multiple housing. Today MCS serves thousands of apartment units and other multiple housing in Pima and Maricopa Counties with modern high quality cable television systems. In

Maricopa County alone, MCS has currently under contract some 4000 dwelling units. The contracts to serve these units were won in many cases after active competition with a franchised cable television operator. Most of these units will be served by private cable systems operating only on private property. This property is in some cases an apartment complex and in others is a condominium association or mobile home park.

The ability of MCS to win contracts to serve private property in the state of Arizona is a reflection of a national phenomenon. Franchised cable television monopolies have not adequately served the multiple housing market. If they had, there would be no market for MCS and other similar companies. The abuses of monopoly franchise holders are well documented. The attitude has been take my service on my terms or starve. See the enclosed amicus curiae brief filed by MCS in the *Loretto* v. *Teleprompter* case for a further explanation of the private cable industry and the approach of franchised monopolies toward multiple housing.

MCS also operates a "franchised" cable system in the suburbs of Tucson under a license granted by Pima County. In this area MCS has constructed over 100 miles of cable plant and is still expanding the system. Currently MCS passes some 8000 dwelling units with this cable system and is serving approximately 3000 subscribers. The Pima County cable system is being expanded daily and subscribers added at a rate of approximately 100 per week.

The legal key to MCS' private systems is that they are built entirely on private property without crossing any public streets. Therefore, no franchise is needed from the local government. A contract is needed however from the private property owner. This owner has the choice of deciding whether to deal with MCS or with the franchised cable operator in the municipality. Therefore, private cable provides the only true multiple channel competition for franchised cable monopolies.

The private cable business has evolved in the last few years as a result of two converging factors. First the FCC deregulated the cable industry so that multiple housing projects and other private systems do not need to be franchised by a municipal government. They may however be optionally licensed with the FCC and must comply with certain copyright legislation. Second, the technology has evolved to greatly reduce the costs of earth stations and headends. This has made a mini-cable system serving as few as 150 to 300 units viable economically. As the technology moves forward, these systems may be viable for even smaller complexes with a larger array of services.

Many franchised cable operators believe that private cable operators are taking a part of their marketplace. There seems to be a consensus of opinion among the major monopoly cable operators that winning a franchise from a municipal government means that the cable system now owns each and every potential subscriber in that particular municipality. They are referred to as my subscribers, our complexes, etc. What these operators fail to recognize is that the only thing that the municipality has granted to the cable operator is the right to the use of the municipality's rights-of-way. This is all that the municipality has the right to grant. The municipality does not own any of the private property within its borders. Each private property owner is free, and must be free, to choose what type of telecommunications service it is going to permit on his own property.

MCS has been successful competing with the franchised monopolies because it has specialized in the multiple housing area and understands the marketing, technology, and servicing of multiple housing projects. In many cases new specialized approaches are needed. The approach that is best for the stable single family home market does not necessarily work well in multiple housing. In Mesa, Arizona for instance, MCS has under contract some 3000 dwelling units at this time. These contracts were all won in spite of the fact that Storer Communications, one of the largest franchised cable operators in the country, monopolizes the city rights-of-way with a city franchise.

Because the franchised cable operators are being beaten in head-to-head competition for contracts on the larger projects they have resorted to other tacts. First they push through local legislation, such as that in the Loretto case, requiring private property owners to deal with the local monopoly for communications. Similar legislation was recently enacted in the city of Tucson. Second, they attempt to cut off the supply of satellite programming.

The programmers basically divide into three categories with regard to the private cable market. The first are those who must deal, because they are common carriers, with the private cable market. These programmers will grant contracts in all marketplaces. The second group, The Entertainment and Sports Programming Network is a prime example, are willing to deal with private cable systems only in the areas that have not yet been franchised. The third group, exemplified by HBO, will deal only with franchised cable systems. Then there are hybrids which will grant contracts in some franchised areas and will not in others evidently depending upon the amount of pressure that has been brought to bear by the franchised cable operator. Basically what we have seen occur is that when the franchised cable operator is unable to win contracts for certain of the multiple housing projects in a given community it will then call up the programmers and apply pressure, relying on their large nationwide subscriber base, for the programmers not to deal with MCS. This is the only logical explanation for the refusal of certain programmers to grant contracts to MCS since MCS has had no trouble in obtaining contracts in any of its franchised areas. I believe the analogy would be very similar to General Motors contacting U.S. Steel and using its market influence in an attempt to keep U.S. Steel from dealing with American Motors. Today it is a clear cut case of an operator refusing to acknowledge the changes in technology and regulation and refusing to successfully compete in the marketplace and then attempting to use its current market strength to stamp out the competitive factor before the competition can grow to a threatening size. One must wonder how successful franchised cable would have been if AT&T had been able to prevent cable from using its poles.

Of course, the programmers should be able to protect themselves with regard to technical standards, financial responsibility, undue administrative burdens, etc. In fact, MCS today has over 5200 subscribers. Therefore, MCS is much larger than many of the cable companies with which the programmers eagerly deal. The fact that these programmers are eager to enter into contracts with MCS where MCS has franchise agreements demonstrates that the problem is not a result of technical ineptitude, financial irresponsibility, or administrative burdens. It also establishes that the failure to deal is not the result of any supposed contractural obligations to third parties such as the movie companies or the sporting groups. They only logical explanation then is that the failure to deal is the result of coercion by the franchised cable operators who are attempting to stifle the only real competitive influence that currently exists in the cable telecommunications marketplace. In the future direct broadcast satellites and other forms of advanced technology may provide competition. However, at this time private cable is the only real viable multichannel competitor.

I seriously question whether a purveyor of information and communications should be coerced not to deal with a ready, willing and able buyer by the threatening attitude of the buyer's competition. This is a classic case of a competitor trying to stop the competition not through having a better product, better service, better pricing, etc. but rather through merely exerting economic power. I do not believe the public, which at last has the opportunity to choose a different method of telecommunication service, is well served by such a boycott. I believe this is particularly true since the programmers are using technology that was developed largely at taxpayers' expense and are also utilizing the scarce orbital spacing which should benefit all citizens.

The telecommunications act, S. 2172, specifically relates to this problem by providing for very serious monetary and criminal penalties with regard to piracy of satellite signals. I believe that a person refusing to pay should in fact be subject to serious penalties. However, if the legislation is to invoke very serious criminal penalties for failure to pay for service I feel it should also address the issue of the programmers failure to sell to ready, willing and qualified buyers. The free enterprise system should be allowed to determine which method of distribution of satellite service prevails. MCS is quite willing to take its chances in the competitive marketplace competing with the much larger media conglomerates. I personally find it a little ludicrous that the very large vertically integrated media giants that are now dominating the cable telecommunications industry are constantly harping on the competitive threat from other elements of the communications industry such as AT&T while they, at the same time, are using every bit of political and economic muscle they can muster to stifle the only real current competition that exists in the cable telecommunications industry.

Cable companies in the past have asked for and received special legislation which requires local broadcasters to permit their signal carried on cable television without compensation. I personally agree with this legislation. However, the arguments I hear today from the cable television industry sound much like those that were heard twenty years ago from the broadcast industry when the issue of carriage of broadcast signals was being fought legislatively. Cable television won that battle and has prospered from the legislation. It also won pole attachment legislation because the communications market was controlled by a monopoly which was using that control to stifle competition. The traditional cable industry is still fighting for legislation to prevent AT&T from using its vast economic strength to dominate the telecommunications industry. Again, I also believe that AT&T could be a potential death-dealing competitor because of its vast resources which have grown up under a government protected monopoly. At the same time however, I fail to see how the traditional cable industry, which also has achieved much of its economic power under aegis of numerous monopolies protected by local government, can ask for such protection while choking off private cable. Private cable has never had the luxury of operating in a monopoly utility-like environment. Our whole focus with regard to the cable industry is that if product is made available we can provide a more effective and attractive service in the free enterprise marketplace than can the companies that are currently protected by large government monopolies. These huge communications conglomerates have every advantage. They are protected by the local monopoly, they have economic clout, and supposedly are providing the best service at the lowest price to the consumer. With all of this going for these conglomerates one might wonder why they have been forced to resort to local legislation and cutting off the only source of program supply that is available to the private cable industry. I propose that the reason that these conglomerates must resort to protective local legislation that strengthens the monopoly and to cutting off the source of supply of the private cable industry is that they have failed to move forward and identify the fact that the changing technological and regulatory environment has resulted in choice in the cable telecommunications market. Private cable successfully competes with the large monopoly oriented conglomerates because it concentrates not on what the local government wants most but on what the final consumer wants most.

In conclusion, private cable is quite willing to take its chances against the large conglomerates in the marketplace because we realize there is a market that has not been well served by the traditional cable monopoly. By concentrating on this marketplace, private cable has been able to develop a viable and growing industry. Evidently those controlling the communications conglomerates feel so threatened by this industry that they must now attempt to cut off its sources of supply of product. They even ask for further government protection with regard to their already significantly protected economic position. I suggest that it will be to the benefit of the citizens of the country to assure that the only viable form of competition presently in the marketplace is provided with the opportunity to purchase the supply of programming it needs to survive. Private cable is not asking for free service. It is only asking for fair dealing and is very willing to pay the same rates that comparable cable companies are paying and it is willing to comply with all reasonable technical and quantity requirements. It is also not asking for any monopolies or exclusive rights to service a given marketplace. It is quite willing to take its chances in the competitive free market. It must however be given the opportunity to compete. Just as cable twenty years ago was given the opportunity to compete with over-the-air broadcasting, private cable should now be given the opportunity to compete with the monopolistic cable franchises. Private cable can only compete if it has a secure source of product. Strengthen the laws against theft of service, but assure that programming provided over the nation's airways and generally available to cable television systems using the public streets is also made available to ready, willing and able buyers not using the public streets.

Sincerely,

GARY B. DAVIDSON,
President.

EDISON ELECTRIC INSTITUTE,
Washington, D.C., May 25, 1982.

Hon. BARRY M. GOLDWATER,
Chairman, Subcommittee on Communications, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Edison Electric Institute (EEI) would like to submit this statement for the record in the hearings on S. 2172 conducted before the Subcommittee on Communications. EEI is the association of America's investor-owned electric utilities. Its members serve 99.6 percent of all ultimate customers served by the investor-owned segment of the industry, generate more than 77 percent of all electricity in the United States and service some 65 million ultimate electricity customers.

We have noted that in testimony before your Subcommittee on April 28, 1982, Thomas Staubitz, president, New Mexico Cable Television Association, raised a problem unnecessarily due to a misinterpretation of the present law. The problem he identified is not now addressed by S. 2172 and need not be for the reason that Mr. Staubitz' objective is achieved by the current law.

Mr. Staubitz directed the Subcommittee's attention to problems involving cable television attachments to utility poles. He correctly noted that in 1978 Congress enacted amendments to the Communications Act which conferred jurisdiction on the FCC to resolve complaints concerning rates for cable attachments to utility poles. He then discussed three problems involving the pole attachment law which he asked, on behalf of NCTA and the New Mexico cable operators, that the Subcommittee address in S. 2172. The first matter which Mr. Staubitz identified as a problem is the one that prompts us to write this letter.

On page 2 of his written statement, Mr. Stubitz says:

"First, the present pole law is scheduled to expire in February 1983. We urge that you extend the law past this date. Nothing has happened since enactment of the law which makes it any less necessary than it was in 1978. If anything, the need is even greater."

This is an incorrect statement of the law and one which we assume arises from a misinterpretation of the cable television pole attachment section added to the Communications Act in 1978, particularly subsection (e). 47 U.S.C. § 224(e). EEI would like to correct the record in this regard so that members of the Senate do not act upon Mr. Staubitz' suggestion based upon a misunderstanding of the law.

Subsection 224(e) of the Communications Act is the so-called "sunset" provision. It provides that the statutory formula for just and reasonable rates which is set out in subsection 224(d) will expire five years from the date of enactment of the 1978 amendment, February 21, 1983. Contrary to Mr. Staubitz' concern, after that date the FCC will continue under the remaining provisions of Section 224 to have jurisdiction to resolve complaints concerning rates for cable television attachments to utility poles without any further action by Congress. The only effect of subsection 224(e), which is entirely logical and reasonable, is to free the FCC after February 21, 1983, to adopt its own formula for determining just and reasonable rates. The FCC would do so based upon its expertise gained after five years of implementing its new statutory responsibilities and its understanding of the competitive, technological and other changes which have occurred in the industry since enactment of section 224 in 1978. This is just as Congress intended it should be. S. Rep. No. 95-580, 95th Cong., 1st Sess. 21 (1978); 123 Cong. Rec. H. 11448 (daily ed. October 25, 1977); 124 Cong. Rec. S. 967, remarks of Sen. Hollings (daily ed. January 31, 1978).

The result which Mr. Staubitz seeks, retention by the FCC of its jurisdiction to resolve complaints concerning rates for cable television attachments to utility poles, is, in fact, fully preserved by the present law. No need exists for any change in that regard. Congress should properly leave the law as it is, thereby permitting the FCC in 1983 to reevaluate the formula for determining just and reasonable rates based upon experience gained in administering this program since 1978. The FCC will continue to exercise its authority to resolve complaints based upon the formula it adopts.

We appreciate this opportunity to file this statement for the record.

Sincerely,

WALKER NOLAN,
Vice President, Legislative Affairs.

BURLINGTON COUNTY COLLEGE,
Pemberton, N.J., May 25, 1982.

Mr. CHRISTOPHER COURSEN,
Communications Counsel for the Senate Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR MR. COURSEN: Please accept this letter as an indication of appreciation by Burlington County College and other institutions of higher education for the support of Senator Barry Goldwater regarding access provisions for cable television and other broadcast modes by educational institutions. Many colleges have been successful in extending learning opportunities through cable television to hundreds of thousands of students across the country who might otherwise have been unable to visit their local campuses. The continuation of this important service is highly dependent upon continued access to local broadcast and cable technology.

We thank you and Senator Goldwater for your support and encourage legislation such as Senate Bill 2172 which would help assure colleges and universities continued access to educational television broadcasting through cable.

Most sincerely,

Harmon B. Pierce,
President.

Arizona State University,
Tempe, Ariz., May 27, 1982.

Hon. **Barry M. Goldwater,**
U.S. Senate,
Washington, D.C.

Dear Senator Goldwater: Arizona State University has been engaged in use of cable television for educational purposes since August of 1979. ASU's KAET telecommunication center has facilitated the use of one educational access channel on one cable system serving the cities of Phoenix and Tempe. An average of 25 courses for credit have been transmitted annually on behalf of ASU's Continuing Education Service and for Rio Salado Community College, the outreach unit of the Maricopa County Community College District. Several repeat transmissions of the courses each week resulted in 4 to 5 hours per day of channel use.

Beginning in September of 1982, the educational cable television service will be expanded to 12 hours per day. Noncredit courses will be added to the schedule along with how-to-do-it programs, educational programs for children, and informational programs for adults sponsored by community service agencies such as libraries, hospitals and schools. Plans also are underway for a large scale demonstration of instructional programs for elementary and secondary in-school utilization.

Negotiations are underway for extension of the educational cable television service to additional cable television systems operating in the Phoenix metropolitan area. It is fully expected that all cable systems in the area will begin carrying the service before the end of calendar 1982. Thus the educational cable television service facilitated by ASU/KAET will be available to all cable television subscribers in the Phoenix metropolitan area.

With respect to Senate Bill 2172, I would like to offer the following comments:

1. Educational and public telecommunication services exist today in the United States because previous FCC and Congressional actions reserved channel capacity for these purposes. Without reservation of channels, it is doubtful that the educational community would be able to utilize cable television to transmit services to constituencies. In a free open market situation, educational entities would be left out because they either do not have access to risk capital and/or require long periods of time to accumulate financial and other support for activating new telecommunication services.

2. Present language in the bill applies the "reservation" only to those cable systems with more than 20 channels. The need for educational cable television services is probably greater in those communities having less than 20 cable channels. Such communities tend to be smaller in size and unable to supply the variety and depth of educational services that characterize large urban centers.

3. I have serious reservations with providing the FCC statutory authority to abolish educational access requirements when it determines alternative means for accomplishing such access are available. The present Federal Communication Commission members tend to believe that a large volume of channels will automatically result in diversity of programming and fill the needs of the people for alternative services. This open market approach has resulted in blocking educational interests from the direct broadcast satellite systems and from low-power television. The policy has resulted in further concentration of power among a few companies which utilize these new technologies for delivery of commercially feasible, entertainment-based programming.

We at KAET particularly appreciate Senator Goldwater's ongoing efforts to promote the efforts of public broadcasting.

Sincerely,

Robert H. Ellis,
General Manager, KAET Television Service.

American Association of School Administrators,
Arlington, Va., May 28, 1982.

Christopher Coursen,
Assistant Communications Counsel, Subcommittee on Communications, U.S. Senate, Washington, D.C.

Dear Mr. Coursen: The American Association of School Administrators (AASA) urges support for S. 2172, which would require that all cable television systems with 20 channels or more set aside at least 10 percent of those channels for use by educational institutions and other public access.

As you know, the schools of this nation are beginning to make productive use of Cable television. Those uses are many and varied, ranging from enhancing home bound instruction and coverage of board meetings to presentation of school speakers, activities and events.

Thank you for your consideration in this most urgent matter for the public schools of America.

Sincerely,

Gary Marx,
Associate Executive Director.

The U.S. Trade Representative,
Washington, D.C., May 28, 1982.

Hon. **Barry Goldwater,**
Chairman, Subcommittee on Communications, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

Dear Barry: In response to the public hearings held on April 26, 27, and 28 on S. 2172, the Cable Telecommunications Act of 1982, in your Subcommittee on Communications, I wish to express my position on the trade policy implications of this legislation. I would appreciate my letter and the accompanying materials being included in the hearing record.

First, I commend you for your leadership in raising the market access problem for our cable telecommunications industry in light of foreign monopoly competition. I share your concern that the state structure of foreign telecommunications industries will make it more difficult for us to achieve the degree of access to which our industries are entitled. We have already experienced difficulties along these lines, as you well know, and it is crucial that our overall strategy in this area be directed at the achievement of open access.

We obviously must develop a set of principles that make it clear to our trading partners that two-way trade in this sector must be established consistent with international rules. At the same time, our strategy should not be fashioned in a way that narrows our considerations to the point where the telecommunications industry and the U.S. economy are the long-term losers. That is why I believe that sector-by-sector reciprocity is undesirable.

In my view, a policy of sectoral reciprocity is not in our national interest and is not a useful tool for opening foreign markets. To the contrary, such an approach to our trade problems could lead to the closing of foreign markets to U.S. goods and services and increased worldwide protectionism.

Therefore, I urge you and members of your Subcommittee to delete all language relating to retaliatory actions which may be taken by regulatory agencies, in particular the Federal Communications Commission.

As you may be aware, I outlined this Administration's position on reciprocity trade during a hearing on March 24, 1982 before the Senate Finance Trade Subcommittee. As a result of this hearing, my Office has consulted with the members of the Trade Subcommittee on drafting of a general multilateral bill that would offer a solution to the trade problems encountered by U.S. firms seeking fair and equitable opportunities in foreign markets.

This legislation, which is being authored by Senator Jack Danforth, will enable us to address the type of problem of which you are concerned in the communications industry. Such an approach offers the only acceptable way of solving these problems without opening the door to either sectoral reciprocity provisions in other legislation or expanded roles for independent regulatory agencies in trade policy.

Further, this Administration is committed to enforcing our domestic and international trade laws and agreements. Evidence of this commitment is the fact that during the past year this Office has initiated eleven Section 301 "Unfair Trade Practices" cases. It is my intention to continue these efforts. Certainly in the telecommunications sector I would expect the Administration to be particularly aggressive in asserting our rights abroad, not only because of the strength of this important sector but also due to the very concerns raised in your legislation.

Our long-term goal is to develop multilateral approaches that establish some international disciplines in this area. The Government Procurement Code is an important first step that can help us deal with communications equipment problems. More work is required to bring services under this kind of umbrella, and that is why this Administration is putting services as one of the priority items for the next GATT work program. In this regard, the general reciprocity bill by Senator Danforth will make clear to our trading partners that the U.S. Congress supports this effort.

In the meantime, you can be assured that we will deal with communications trade problems aggressively, taking into account the legitimate rights our industry has abroad. I have enclosed for your review and inclusion in the record two statements I have presented on this subject in the House and the Senate.

Very truly yours,

William E. Brock.

Enclosures.

Statement of Ambassador William E. Brock III, U.S. Trade Representative, Before the Subcommittee on Telecommunications, Consumer Protection, and Finance

I am pleased to appear before this Subcommittee today to speak on the reciprocity provisions of H.R. 5158. The concept of what we would term "global reciprocity" has been the principle underlying our world system for trade in goods since the inception of the General Agreement on Tariffs and Trade in 1948. At the present time we are working to extend these principles to trade in service and investment. Today we see many bills before Congress with reciprocity in the trade area defined in various ways as their goal. We believe that these bills raise fundamental questions regarding U.S. trade policy and the Administration is carefully considering them.

Today my testimony will focus on the particular reciprocity approach sugested in H.R. 5158. We would term it a "sectoral reciprocity" approach. I believe that this Administration shares the goals represented in H.R. 5158—the facilitation of U.S. exports of high technology products and communications services. Nevertheless, we have serious reservations, which I will describe, regarding the use of sectoral reciprocity as a tool in acheiving this end. This Administration is deeply committed to removing impediments to U.S. exports of high tehnology products and communications services—whether imposed by foreign governments or self-imposed. In this connection, we are already pursuing a number of approaches. The first, of course, is to continue to vigorously ensure that our rights under the GATT are respected. However, we are also looking to expand or improve on these rights.

In our agreement with Japan regarding its Nippon Telegraph and Telephone Company we opened a considerable new market to U.S. high-technology industries, providing rights to market access which heretofore did not exist. This Agreement has only been in force for one year and it is too early to judge its results. During this first year of implementation, we noted that NTT fully met its obligations, going beyond them in some cases, although we have yet to see major results in commercial terms. We intend to work closely with NTT and U.S. industry to ensure that the considerable potential for commercial benefits of the Agreement is achieved because in the final analysis the Agreement will be evaluated in terms of sales generated.

In a broader context, we will be trying to open access to the purchases of other countries' state-run telephone companies, generally known as PTTs, through expansion of the Government Procurement Code. Re-negotiation of the scope of this Agreement is scheduled to begin some time next year and we have already put our trading partners on notice that one of our top priorities will be coverage of the PTTs.

In a still broader context, we are pressing for consideration of the special trade problems of high technology industries and trade in services in the upcoming ministerial level meeting of the GATT in November.

Finally, we have been meeting and will continue to meet with representatives of our high technology industries to identify and develop methods to deal with obstacles to their exports.

Nevertheless, while we are considering various tools to expand high technology exports we do not believe that sectoral reciprocity legislation would be a useful tool. I intend to focus on the fundamental problems we see with this approach which is represented in H.R. 5158, but I should note that we have particular concerns regarding the consistency of this legislation with our international obligations.

It is a basic fact of economic life that national economies differ. Countries don't produce or necessarily have the capability to produce everything. For the past 35 years we have had to take this fact into consideration in negotiating trade agreements under the GATT. We knew that we couldn't negotiate access to the Japanese market for U.S. wheat producers by offering access to our market for wheat to the Japanese. The Japanese are in no position to export wheat to us and would be understandably reluctant to accept such a deal. Likewise, we couldn't expect to negotiate access to foreign markets for our computer exports by offering access to our computer market to countries which don't produce and which don't expect to produce computers. Therefore, a narrow sectoral approach to trade negotiations could not be productive. Instead, we have negotiated agreements with our trading partners which cover a broad range of sectors, with an overall balance of concessions—one might call it reciprocity.

A policy of sectoral reciprocity would require us to ignore these 35 years of negotiating history. We would be required to go to our trading partners and tell them that unless they made unilateral concessions in a sector to provide reciprocity we were going to violate international obligations which were entered into in good faith and which provide global reciprocity. Let's not kid ourselves. If we blatantly breach our international obligations in the trade area we can expect to be hauled before the GATT and have retaliatory measures applied to our key exports. Looking just at the high technology area, if we exclude foreign telecommunications equipment from our market, some countries would be eager to retaliate by blocking our computer and business machine exports. We would not stand idly by and allow our international rights to be violated and we shouldn't expect other countries to respond differently.

I will not try to tell you that we are entirely satisfied with the current state of our trade relations with other countries. Foreign markets are not as open as we believe they should be. We feel that international rules should be extended to services and investment. There are problems, as we all know, and we are trying out best to deal with them. However, we believe that on balance the international trading system established by the GATT has been beneficial to our interests. To the extent that problems still remain, they point to a need for further strengthening of the GATT. It is not in our interest to try to solve our trade problems by using methods which weaken the GATT system.

The fundamental principles of the GATT require that we honor our trade concessions, that we not impair these concessions with laws which discriminate in favor of domestic producers and that we treat all GATT signatories alike. This last point is known as MFN, the most favored nation principle. We cannot expect that the passage of H.R. 5158 will immediately lead to the opening of foreign telecommunications markets that we now view as closed. Therefore, a policy of sectoral reciprocity would require us to impair previous concessions and treat GATT signatories differently depending upon their telecommunications policies. Under the GATT countries subjected to these sanctions could ask for adjudication and, if we failed to comply with our obligations, would be authorized to retaliate against U.S. exports.

I am concerned when I hear the argument that this type of legislation is needed to give us a weapon to use in dealing with our trading partners. If this would be a weapon, I'm not certain in which direction it would be pointing. It might be pointing at ourselves. How credible a threat would it be to threaten to violate our international obligations when we know full well that it will result in retaliation hitting our most vital export sectors. There would then be pressure to close our market even further to foreign products which could lead to an unraveling of the whole trading system.

Finally, I wonder if those who support sectoral reciprocity in telecommunciations would support the application of this approach to textiles or dairy products. Would they be willing to say that we are willing to go as far in opening our market to these products as any other country is willing to be open to our exports of the same products?

Access to foreign telecommunications markets is one of our highest priority objectives. We know that this is an area where we can win sales overseas and we can ill afford to ignore barriers to U.S. sales given the current economic picture. However, if we are to negotiate the opening of these markets we have to enter into these negotiations with realistic expectations. We cannot force all our trading partners to negotiate by threatening retaliation if they don't. They will react to such threats the same way we would. We will have to negotiate on the basis of seeking mutual advantage. We will have to find a balanced package of concessions which satisfies all sides. If we take an approach of narrow sectoral reciprocity, this will not be possible. We must approach this negotiation from the stand point of global reciprocity as we have aproached all previous negotiations. Therefore, we believe that the sectoral reciprocity provisions of H.R. 5158 should be deleted.

STATEMENT OF AMBASSADOR WILLIAM E. BROCK III, U.S. TRADE REPRESENTATIVE, BEFORE THE SENATE FINANCE COMMITTEE

The United States has long been the world leader in promoting more liberalized trading practices and policies. As a nation, we have initiated every major multilateral negotiation, including the Kennedy Round in the 1960's and the Tokyo Round concluded in 1979. We will not change course now.

We intend to continue more vigorously than ever before our efforts for a freer world trading system.

Last summer, I appeared before this Subcommittee to present the Reagan Administration's statement on U.S. Trade Policy. The cornerstone of that policy was expressed as follows:

"Free trade, based on mutually acceptable trading relations, is essential to the pursuit of our goal (of a strong U.S. economy). * * * We will strongly resist protectionist pressures. Open trade on the basis of mutually agreed upon rules is in our own best economic interest * * *

Internationally, we will pursue policies aimed at the achievement of open trade and the reduction of trade distortions, while adhering to the principle of reciprocity in our trading relations.

(Toward this end) * * * we will strictly enforce United States laws and international agreements * * * and * * * we will insist that our trading partners live up to the spirit and the letter of (such) agreements and that they recognize that trade is a two-way street."

I reiterate these statements of policy today. The goal and intent of the legislative proposals—to make sure trade is a two-way street—before this Subcommittee are consistent with, and are a natural extension of this trade policy. Increased equity and reciprocal market access and opportunities for U.S. exporters and investors has been, and will continue to be, a goal of this Administration. In so far as Congress and the Administration are both examining ways to better achieve this goal within the context of our overall policy and our international obligations, we are in agreement. However, a clarification of our purpose is essential, for a distorted use of reciprocity could undermine an already vulnerable multilateral trading system, trigger retaliation abroad, further depriving the U.S. of export markets, and erode, if not eliminate our role as the world leader in liberalizing international trade.

Our commitment to free trade requires a bold positive action, not just passive lip-service to an ideology. The dynamics of trade are such that if we do not move forward, then we slide back.

We make no contribution to the goal of free trade by ignoring attacks upon it by others or by not pursuing increased market access for our goods, services, and investment. Clearly, no nation can long sustain public support of any policy unless its people sense that there is equity and tangible benefits for them in the application of that policy.

Our adherence to a free trade policy requires us to strictly enforce existing trade agreements, to strengthen our domestic trade laws to make them more useful and responsive to the needs of those they protect, and seek expanded coverage of trade issues under the mutually accepted international framework of the General Agreement on Tariffs and Trade.

In following this course of action, we must not lose sight of the fact that the United States and its trading partners must work within the framework of our international obligations. The whole reason for the existence of the GATT lay in the desire to eliminate the trade destructive retaliatory practices of the two decades preceding World War II. It has worked, if the expansion of world trade over the past thirty-five years is any indication.

Frustration with GATT's seeming inability to deal with new forms of barriers and trade distortions is no justification for U.S. abandonment of our commitment to free trade, and certainly no justification for our resort to similar negative unilateral actions. On the contrary, it is clearly our best reason for renewed efforts to strengthen the international code of conduct and make it work. We must view the many pieces of trade legislation that have been introduced in this Congress in this perspective.

Four principles will guide our approach to any suggested legislation:

First, it must be absolutely consistent with current obligations under the GATT and other international agreements.

Second, it must stress multilateral rather than bilateral or sectoral solutions.

Third, it must focus on strengthening existing international institutions and expanding international agreements to include those areas, such as services, investment and high technology not presently covered.

Fourth, it must strengthen the negotiating mandate and flexibility of the President in his efforts to achieve a more liberalized world trading system and a reduction of barriers to U.S. workers and enterprises.

As U.S. Trade Representative, I have attempted to vigorously pursue such a course of action. During the past year my office has initiated 10 Section 301 investigations involving 7 countries for unfair trade practices. We are now pursuing international dispute settlements in these cases. Five such investigations were recently initiated concerning the use of subsidies by European nations on production of specialty steel. And we have assisted many smaller industries by providing technical assistance on the different processes available for seeking relief from unfair trade practices or competition.

It is my intention to continue these efforts during the coming year. There is more work to be done, and I commend the members of this Subcommittee for their contributions. You have identified areas in need of attention: trade in services, equitable treatment for U.S. investors, and increasing competition in the high technology field.

While the United States can move domestically on these issues through legislation, an international forum is necessary to have our interests reflected in the world trading systems. To this end, the United States is actively participating in preparations for a ministerial level meeting of the GATT next November. We hope to use this meeting not only to review the operation and implementation of the MTN agreements, but also to chart a course for our international trade activities for the balance of the 1980s. Among our key objectives are the initiation of work programs on services, investment and high technology. We also hope to use the Ministerial to renew and invigorate international efforts to bring trade in agricultural goods more closely into the disciplines of industrial trade.

This Administration believes that there are useful elements contained in many of the legislative proposals under consideration here today and we would welcome the opportunity to work with the Chairmen and Subcommittee Members in both the Senate and the House. While we cannot comment on each provision of every bill today, I do wish to outline those elements the Administration would find beneficial.

TOOLS TO INCREASE MARKET ACCESS IN SERVICES

In contrast to trade in goods, we are currently operating without any meaningful international rules in services trade, an area where we are experiencing expanded trade opportunities and growing barriers to them. It is therefore timely to clarify the President's authority to negotiate international agreements for services. Such a clarification should stress the need for close cooperation with states that have key responsibilities in some of our service sectors.

Clarification of the inclusion of services under the authority granted by Section 301 of the Trade Act would demonstrate to our trading partners the United States' resolve in seeking equitable treatment in this area. In addition, Congress' specific mandate to negotiate a multilateral framework agreement for trade in services would provide the Administration with the tools to make such a goal a reality.

TOOLS TO INSURE EQUITY IN DIRECT FOREIGN INVESTMENT ABROAD

As in the case of exports of services, there are few international agreements to protect the interests of U.S. investors abroad. A clarification of the President's Section 301 investigative authority with respect to unfair practices in the area of investment is necessary. While it has always been and will continue to be U.S. policy to welcome market-oriented direct foreign investment into the U.S., it is also U.S. policy to obtain equity for U.S. investors abroad to the greatest degree possible. However, since the implementation or pursuit of these two policies may occasionally create operational conflicts, the investment issue deserves careful consideration by Congress and the Administration.

Further, like trade in services, additional negotiating authority in this area is an important and often necessary step toward addressing many international problems in this area.

EMPHASIS ON RECIPROCAL MARKET ACCESS IN SECTION 301

Several legislative proposals have been made to emphasize reciprocal market access or similar competitive opportunities in the consideration of a Section 301 case. Reciprocity as a principle embodied in the GATT and in our trade laws, and increased market access as a goal of any free trade policy, is welcomed by the Administration. However, we must not enact laws which will force U.S. trade policy to require bilateral, sectoral, or product-by-product reciprocity.

In our view, the primary and preferable method for obtaining substantially equivalent market access should always be to seek liberalization of foreign markets rather than to raise equivalently restrictive barriers of our own. Our goal should be to move our trading partners forward through negotiations to a level of market openness more similar to our own.

The concept of what we would term "global reciprocity"—that is, the belief that the aggregate benefits derived by each party to the GATT are substantially equivalent to concessions given by any other party—has been the principle underlying our world system for trade in goods since the inception of the General Agreement in 1948. Though the GATT and most-favored-nation (MFN) system has fallen short in some ways, the United States and other countries have greatly benefited from this system. Therefore, we intend to adhere to our mutually accepted obligations under the GATT, and that must discipline our understanding of a reciprocity principle.

Because our present trade laws and trading system already provide the tools to seek reciprocal market access in our trade in goods, the Administration believes that the pursuit of more open foreign markets becomes even more important in its application to reaching non-tariff barriers in areas not adequately covered by the GATT, other international agreements, or U.S. law, like services and investment.

MODIFICATION OR SUSPENSION OF EXISTING U.S. TARIFF AND INTERNATIONAL TARIFF CONCESSIONS

Some proposals in the tariff area would provide the President with more flexible authority to modify our international tariff concessions and U.S. tariffs. Such flexibility could provide authority that would assist our efforts to obtain increased market access for U.S. goods.

One such authority that expired in January of this year is Section 124 tariff reduction negotiating authority of the President. As the Chairman is aware, the Administration is seeking an extension of this law and legislation is currently pending before this Subcommittee and the House Ways and Means Committee.

HIGH TECHNOLOGY

Focus should be directed toward the need for multilateral consideration of high technology trade, a priority item in our work on the GATT Ministerial agenda, and one which many countries legitimately recognize as a critical area for economic development. I ask that Congress examine the desirability of Presidential authority to negotiate the reduction of barriers to trade in high technology goods, including the reduction of tariffs. Such a provision would give the President specific authority to reduce U.S. tariffs on high technology products in exchange for equivalent concessions.

Other legislative proposals also deserve more careful examination. There are areas which have not been fully examined. I refer to the erosion or rejection by some nations of industrial and intellectual property rights, especially in more technologically advanced products, or the impact of foreign industrial planning and country targeting on an open market such as ours. A thorough examination of these issues will be of benefit.

While there is much good in the ideas generated by this Congress and this Committee, there are elements of these trade bills which we believe would be problematic, if not impossible to support.

EXTENSIVE REPORTING REQUIREMENTS TIED TO SECTION 301 INVESTIGATIONS

A number of the bills pending before Congress would require extensive and continued analyses of foreign barriers and require submission of a report on these analyses to Congress together with an indication of what action the Administration might take to eliminate the barriers. The idea of developing a list of foreign barriers is a good one and one that we have already followed to some degree. For example, we have developed a list of foreign practices in the services sector as a first step in preparation for an eventual multilateral negotiation on services. However, I am opposed to linking such analyses to Section 301 by requiring that foreign practices be labelled in accordance with the standards for action under Section 301. For example, requiring the Administration to state that a particular foreign practice is inconsistent with the GATT or Codes before the international dispute settlement body has had the opportunity to review the issue could undermine the integrity of the international dispute settlement system. Similarly, to label any foreign practice as meeting one of the standards for action under Section 301 would prejudice a 301 investigation on the subject.

ADDITION OF AN INDEPENDENT STANDARD WHICH COULD LEAD TO SECTORAL RECIPROCITY

As noted earlier, this Administration welcomes global reciprocity as an objective or principle of overall U.S. trade policy. However, to establish reciprocity on a bilateral, sectoral or product-by-product basis would undercut any realistic negotiating position. A new independent standard for unilatral action under Section 301 authority could mean that instead of judging the fairness of foreign market access according to internationally agree standards, we would be required to judge it by the access accorded to foreigners in the U.S. market. That kind of result would undermine the multilateral approach to international trade and would be opposed by the Administration.

The issue of reciprocity is complex and a U.S. reciprocity policy, therefore, needs to be formulated and implemented in a comprehensive manner. It is a basic fact of economic life that national economies differ. Countries don't produce or necessarily have the capability to produce everything. For the past 35 years we have had to take this fact into consideration in negotiating trade agreements under the GATT.

We knew that we couldn't negotiate access to the Japanese market for U.S. wheat producers by offering access to our market for wheat to the Japanese. The Japanese are in no position to export wheat to us and would be understandably reluctant to accept such a deal. Likewise, we couldn't expect to negotiate access to foreign markets for our computer exports by offering access to our computer market to countries which don't produce and which don't expect to produce computers. Therefore, a narrow sectoral approach to trade negotiations could not be productive.

Instead, we have negotiated agreements with our trading partners which cover a broad range of sectors, with an overall balance of concessions which we would call reciprocity. Nor can I support the use of the term reciprocity if it means seeking bilateral balance in the narrow sense. Even given the problems we face with Japan in seeking greater market access, it would be dangrous to seek a bilateral balance of trade with them as our standard of fairness. If we were to do so, other countries with which we maintain trade surpluses (such as the EC) would certainly pursue the same policy with regard to the U.S.

In view of the principles and problems which I have set forth today, one can say that there are elements in each reciprocity bill which we could support as well as elements which would pose difficulties for the Administration and for the world economic order. Some of the bills under consideration at this hearing today in one way or another attempt to provide for the improvement and strengthening if our negotiating authority and leverage in areas of critical importance to the Administration such as services, investment and trade in high technology goods. Together, some of these provisions could, in combination; prove useful in our efforts to address these critical issues with our trading partners at the GATT Ministerial as well as in overall efforts to preserve by strengthening the international trade and investment system throughout the remainder of this century.

CONCLUSION

As we explore the issues raised by the legislation now before the Senate Trade Subcommittee, the United States will again be assuming an important leadership role in promoting freer and fair trade. As the initiator of every major negotiation, this is not an unusual or unexpected responsibility.

This Congress and this Administration fully comprehend that agreements on services and investment must be negotiated, that the GATT must be tested and strengthened, that agreements must be enforced, and that equity of market access sought.

Throughout this exercise, let us remember that the decisions we make will set the tone in world trade centers. It is with this sense of responsibility that we will work to open foreign markets, not erect new barriers. Any other action would be contrary to the interest of our nation and the world trading system.

National Association of State Universities and Land-Grant Colleges,
Washington, D.C., June 1, 1982.

Senator Barry M. Goldwater,
Russell Senate Office Building,
Washington, D.C.

Dear Senator Goldwater: The National Association of State Universities and Land-Grant Colleges, representing more than 140 major public institutions of higher education in the United States, appreciates your efforts to preserve education's access to broadcast channels.

Within our membership are forty-four Public Broadcasting System licensees; in addition, many of our members hold agreements with cable companies to provide additional and alternative access for educational purposes. Nationally, we can demonstrate successful joint ventures involving member institutions and cable companies. In Detroit, for example, with the support and technical expertise of the Public Broadcasting station, Wayne State University and a consortium of five other institutions of higher education will be broadcasting to the "head ends" of four cable companies in order to reach some seventy thousand homes with educational programming. If all the cable companies in the area where to participate, more than 150,000 homes would be reachable. This project has just begun and holds the promise of providing programming twenty-four hours per day. It is tied to Wayne State's world-recognized "To Educate the People Consortium."

Our members could not point to such accomplishments without the cooperation of many cable companies. However, we need legislation such as you have proposed in order to encourage participation by those cable companies that have not yet recognized the potential for providing educational programming. Therefore, we support your Bill, S. 2172, and particularly Section 606, which requires the Federal Communications Commission to set aside channels for educational and public broadcasting. Survey after survey has demonstrated that the public has a strong interest in courses for credit via cable (65.2 per cent of those queried in the April, 1982 survey by East Lansing Research Associates indicated such an interest.)

You are to be commended for your awareness and willingness to aid higher education in providing this opportunity.

Sincerely,

Robert L. Clodius,
President.

Statement of Bernard J. Wunder, Jr., Assistant Secretary for Communications and Information, U.S. Department of Commerce

INTRODUCTION

If enacted, S. 2445 would amend the 1934 Communications Act to provide a legislative basis for Federal, State, and local regulation of the cable television business. In many important regards, this bill is similar to legislation introduced by Senators Goldwater and Kasten (S. 2172), upon which the Department of Commerce testified Monday, April 26, 1982.

Both measures call for the establishment of a framework of Federal Communications Commission (FCC) regulatory functions and responsibilities, aimed at ensuring the efficient and competitive development of cable communications. Existing local franchise agreements would not be affected by S. 2172 or S. 2445. S. 2445 does not provide for the elimination of Fairness Doctrine, Equal Time, or related content-oriented constraints on cable television, however. Nor does S. 2445 provide for federal technical standards in this area as would S. 2172. Some of the key provisions of S. 2445 are discussed separately below.

FEDERAL-STATE RELATIONS

S. 2172 would declare efficient and competitive cable television operations to be a matter of "primary concern to the Federal Government" (proposed new sec. 601(2)). Under the comparable section of S. 2445, however, State and local governments would be tasked with ensuring that "cable telecommunications are suitable for and responsive to the needs of the local community" (proposed new sec. 601(3)).

We believe that the best means of ensuring that cable television systems provide services suitable for and responsive to public needs is to foster a freely competitive environment. While we appreciate the important role that State and local authorities can and, indeed, should play in franchising cable television operations, we believe that this function is best discharged within an overall framework of Federal legislation that is both limited in scope and explicitly recognizes the need to minimize government program content controls. Aside from the consitutional question whether Congress may lawfully require States and localities to ensure cable communications are "suitable" for their communities, as S. 2445 would propose (see U.S. Const., art. 4, cl. 4; *National League of Cities* v. *Usery,* 426 U.S. 833 (1977)), we think S. 2172 overall strikes a better balance than S. 2445 between Federal interests in uniformity and consistency and State and local interests in local service responsiveness.

LOCAL BROADCAST SIGNAL CARRIAGE

Section 609 of S. 2172 would legislatively affirm the FCC's authority to regulate cable television system carriage of broadcast signals, an authority now said to be "reasonably ancillary" to the Commission's general obligation under section 303(g) of the 1934 Communications Act to "promote the larger and more effective use of radio." See, e.g., *National Cable Television Assoc.* v. *United States,* 415 U.S. 336, 339 (1974) (and citations therein). Section 607 of S. 2445, as currently drafted, however, would go farther and empower the FCC to regulate cable carriage of broadcast signals—"to ensure that the provision of cable communications will not materially impair the ability of any person to receive signals from broadcast stations which such persons would otherwise receive in the absence of the provision of cable communications." Ibid.

We believe that the FCC should continue to enjoy authority to regulate broadcast signal carriage in order to maintain some parity of competitive opportunity among broadcast services. Cf. *WWHT, Inc.* v. *FCC,* 656 F.2d 807 (D.C. Cir. 1981). We do not believe, however, that Federal legislation requiring the FCC to preserve the current level of broadcast signal availability is either needed or appropriate. See, e.g., *Carroll Broadcasting Co.* v. *FCC,* 258 F.2d 440, 443-44 (D.C. Cir. 1958); *MCI Telecom. Corp.* v. *FCC,* 561 F.2d 365, 380 (D.C. Cir. 1977). Accordingly, we again recommend the approach to this issue reflected in S. 2172 over that reflected in S. 2445.

CABLE RATE REGULATION

Existing law permits State and local regulation of the rates charged for basic cable services, but not the rates charged for pay and other cable television offerings. See *Brookhaven Cable TV, Inc.* v. *Kelly,* 573 F.2d 765 (2d Cir. 1979). Both S. 2172 and S. 2445 would affirm this authority. S. 2445, however, would oust this basic service regulation, if the FCC determines that "there exists effective competition for such service in such operating area" (proposed new section 606(b)). Proposed new section 610, as added also by S. 2172, would further require the FCC to issue guidelines for determining the presence or absence of effective competition within 180 days following enactment.

At least one State, Massachusetts, has lifted regulation of basic cable television rates in situations where there is "effective competition," defined under State regulations as the presence of at least three or more over-the-air television signals. At present in Massachusetts, as well as in other States, there is some empirical evidence showing that basic cable television rates are in fact held significantly below costs, in order to maximize system penetration and thus profits earned from pay cable and other services, the rates for which are not subject to economic regulation. At least in such instances, therefore, economic regulation of basic cable television rates would appear to serve no clear public purpose, inasmuch as basic rates are already significantly underpriced and, indeed, cable operators have an incentive to do so.

The Administration has generally supported passage of common carrier communications legislation sanctioning, indeed, mandating, the deregulation of telecommunications services where there is effective competition. The approach toward local cable television rate regulation reflected in S. 2445 would be consistent with this Administration position. It may well be that other States will soon follow the approach to basic cable rate regulation taken in Massachusetts and California, where commendable deregulation steps have been taken. We believe that the approach toward rate regulation reflected in S. 2445, however, is superior to that in S. 2172 and would support enactment of such deregulatory legislation.

S. 2172 would require all cable television systems with twenty or more channels to set aside or dedicate 20 percent of their capacity for (a) public/nonprofit and (b) unaffiliated, commercial channel users (proposed new sec. 606). Under S. 2445, no specific set-aside of channel capacity would be required. The FCC would be authorized to order access be provided, however, upon petition by any aggrieved party and a finding that access had been unreasonably denied for the purpose of restricting competition.

Many, if not most, major market cable television systems today are subject to generalized access requirements contained in their franchise agreement. Neither S. 2172 nor S. 2445 would necessarily alter the effect of these franchise agreements. Additionally, cable television systems may be subject to access obligations under the antitrust laws, and an operator who unreasonably refused access to his cable system in order to monopolize the provision of otherwise competitive services, of course, could be subject to severe sanctions under the antitrust laws.[1]

We believe that existing laws and safeguards are generally adequate to ensure reasonable access to cable television systems. We have indicated, however, that if Congress believes that these safeguards are insufficient, we would not object to a specific channel set-aside requirement applicable to cable television systems of 50 channels or more. While we are thus sympathetic to the goals of the special access provisions of S. 2445, we believe that these can be achieved as effectively under existing law, or through the adoption of the access set-aside that we have recommended.

CONCLUSION AND RECOMMENDATIONS

In conclusion, we believe that, on balance, S. 2172 represents a more desirable framework for the development ultimately of comprehensive cable television legislation than does S. 2445. Although these companion measures have much in common, we prefer the balance that S. 2172 has achieved among Federal, State, and local authorities, and in respect of signal carriage and other obligations. We further believe that the approach toward basic cable television rate regulation reflected in S. 2445 is preferable, as it would mandate deregulation wherever there is effective competition. In regard to cable television system access issues, we believe that the best approach is to require the dedication of not more than 20 percent of channels only for cable systems with 50 channel or greater capacity, and to rely in other instances on existing safeguards including the antitrust laws.

Federal Communications Commission,
Washington, D.C.

Hon. Howard Cannon,
U.S. Senate,
Washington, D.C.

Dear Senator Cannon: This is in response to your letter of May 5, 1982, requesting the Commission's comment on S. 2445, the "Cable Telecommunications Competition and Deregulation Act of 1982."

In my statement of April 26, 1982, before the Subcommittee on Communications, I set forth my views concerning the desirability of national cable television legislation as well as some general views on the substance of what such legislation should contain. S. 2445 is in large measure consistent with the views I set forth at that time. I would like, therefore, to offer only a few specific comments relating to those provisions which are different from S. 2172 and which I find to be of particular importance.

One of the most significant differences between the two bills is the provision in S. 2445 (Section 606) that results in an end to all local cable television basic subscriber rate regulation in those areas where the Commission finds that efective competition exists. I have no disagreement with this provision from a theoretical economic perspective and believe that investigation of those situations where local rate controls have already been eliminated may well show that rates are adequately controlled by the presence of effective market alternatives. There are, moreover, a variety of reasons inherent in the rate setting process itself which suggest that efforts to regulate basic cable subscriber rates by municipal governments are likely to yield unsatisfactory results.

I am concerned, however, that this provision may, in the present regulatory environment, overstep the purpose boundary between federal and local regulatory concerns. The final answer to that issue turns on the relationship between local cable television rate controls and the overall functioning of our national telecommunications structure. Purely in terms of cable television policy, it is important to consider whether this is an area where poor local decisions will only affect local cable subscribers or whether it is an area where poor decisions in community A can affect the public in community B in another state. In addition, it is important to consider what effects such regulation may have on the relationship between cable system operators and the other participants in the telecommunications marketplace with which cable systems compete or which are suppliers of equipment or programming for cable system use.

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[1] See, e.g., *Turf Paradise, Inc.* v. *Arizona Downs*, 1982-1 Trade Cas. Para. 64,460 at p. 72,583 (9th Cir., February 26, 1982); *Southway Theatres, Inc.* v. *Georgia Theatres*, 1982-1 Trade Cas. Para. 64,658 at pp. 73,575-78 (5th Cir., April 5, 1982) (and citations therein).

Although the communication here involved is overwhelmingly interstate in character, it is not illogical to view the service performed as basically an antenna rather than a program or interstate communications delivery service and thus an appropriate subject for local regulation or nonregulation based on local considerations. While there is room for argument, I do not believe the present system of decision making is fundamentally out of balance in this respect.

Significant changes in the existing regulatory pattern, such as the adoption of copyright law changes more nearly approaching a full copyright liability system, could, I believe, change this balance. Some of the fundamental benefits urged in favor of such a change might in fact require offering cable opertors greater control over basic subscriber rates.

Another area of concern to me involves the provisions of Section 7, which require the Commission to encourage the introduction of new services and to presume any such services to be in the public interest whenever the providing of such services is technically feasible without causing significant interference to other radio transmissions.

The spirit of this proposal, to encourage the offering of new services, sound spectrum management, and prompt decision making, reflects highly desirable objectives that the Commission fully supports. The specific language, however, appears to restrict the Commission's discretion to make decisions based on factors other than technical feasibility and the potential for interference. Although new spectrum uses that might be authorized under this provision would no doubt benefit some segments of the public, and even larger segment might sustain a welfare loss as the result of the elimination of alternative possibilities. A private service of benefit to a few, for example, could preclude the later authorization of a broadcast service of benefit to many. If this is not the congressional intent, Section 7 should be redrafted to specify that the presumption is rebuttable by a showing that technical feasibility alone will not ensure maximum public benefit.

In both Section 7 and in other provisions of this legislation, there are requirements that the Commission act within a 180 day time frame. Given the requirements of the Administrative Procedure Act, the Government in the Sunshine Act, delays associated with the publication of documents in the Federal Register, allowance of a reasonable period of time for public comment, the necessity for the staff and the Commission to analyze the evidence and comment presented, and, in some situations, the need to consider applicable treaty obligations and complete necessary international coordination, it does not appear that 180 days would be sufficient time for the Commission to make the required decisions in any complex proceeding.

The imposition of time frames of this type suggests a Congressional decision that the speed of decisionmaking—the accomplishment of rough justice in an expedited manner—is more desirable than an extended and more thoughtful consideration of evidence and alternatives. While such a judgment may be appropriate in some areas where the niceties of collegial decisionmaking and procedural due process otherwise appear likely to overwhelm the need for timely decisionmaking, I do not believe spectrum allocations is an area where that judgment is appropriate.

Section 605, which relates to cable television ownership regulation, contains a provision that would require television broadcast stations that own cable systems in the same area to carry the signals of all stations placing a predicted Grade B contour over the cable system's operating area. I am not persuaded that the evident concern of this provision, a station owner's possible discrimination against competing stations, is justified. If concerns remain in this area, however, I would suggest that a direction to the Commission, similar to that found in Section 605, to "require conditions which minimize anticompetitive practices" might provide a better method of addressing this concern. In addition, the "predicted Grade B" carriage standard could pose some probably unintended problems by creasing unreasonable carriage obligations. A cable system in the Washington, D.C. area, for example, would be required to carry Baltimore, Maryland stations in the situations where this requirement applied.

A final area of concern involves the absence of any provision in S. 2445 to bring the Communications Act into closer harmony with the First Amendment in terms of the intrusive content control requirements now applied to cable television through Section 315 of the Communications Act. The failure to eliminate these requirements, it seems to me, is inconsistent with the basic thrust of this legislation in other areas, fails to address the Constitutional issues involved, will result in severe practical administrative problems for this agency in the future, and will ultimately diminish the sought after diversity of viewpoint through a forced centralization of legal and editorial responsibility in the cable operator for all cablecast programming distributed. I would urge that some detailed consideration be given to the elimination of Section 315 from its application to cable television operations.

I appreciate very much your invitation to participate in the dialogue on this legislation. If I can be of any further assistance, please let me know.

Sincerely,

Mark S. Fowler,
Chairman.

Statement of the National Association of Regulatory Utility Commissioners on S. 2445

The National Association of Regulatory Utility Commissioners (NARUC) hereby submits its comments on S. 2445, legislation proposing the Cable Telecommunications Competition and Deregulation Act of 1982, introduced by Senators Howard W. Cannon of Nevada and Ernest F. Hollings of South Carolina on April 27, 1982.

The NARUC is a quasi-governmental, nonprofit organization founded in 1889. Within our membership are the officials who sit on governmental agencies within the fifty States and the District of Columbia, Puerto Rico and the Virgin Islands which have the authority to regulate utilities and carriers. Our chief objective is to serve the consumer interest by seeking to improve the quality and effectiveness of public regulation in America.

The members of the NARUC appreciate this opportunity afforded by the Committee on Commerce, Science, and Transportation's Communications Subcommittee to express the Association's views concerning S. 2445.

SUMMARY OF PREVIOUS TESTIMONY

In a prepared statement and in oral testimony presented to the Comminications Subcommittee on April 27, 1982, the NARUC President Edward F. Burke, Chairman of the Rhode Island Public Utilities Commission, expressed the NARUC's position on S. 2172, the Cable Telecommunications Act of 1982, introduced by Senator Barry Goldwater of Arizona. Since the two bills are similar in form and content, many of President Burke's statements in that hearing are relevant to S. 2445 as well.

To summarize the previous testimony briefly, the NARUC strongly believes that regulation of the cable telecommunications industry is necessary, as marketplace forces alone are not adequate to ensure the provision of quality service to the public in a safe and reliable manner, and at just and reasonable rates.

There has long been a need for congressional clarification of national policy concerning the cable television industry. The NARUC believes that the Federal Communications Commission's (FCC's) role in regulating cable telecommunications should be limited to issues of Federal concern, as is the case with telecommunications media addressed in the 1934 Communications Act. Our statement on S. 2172 identified the appropriate areas for Federal jurisdiction as the establishment of minimum standards regarding transmission and the minimum provision of access channels. The statement reflected the NARUC's fundamental belief that primary responsibility for the regulation of cable should be left to State authorities who possess and intimate knowledge of local situations and who are thus in a preeminent position to balance competing interests that may be involved in cable communications decisions.

To this end, the NARUC proposed that S. 2172 be revised to reflect the States' primary jurisdiction in all matters concerning franchised cable systems and to permit the States to establish additional regulations concerning technical standards and access channel provision compatible with Federal regulation of these areas. The statement articulated the NARUC's concerns with specific provisions of S. 2172 which would not adequately ensure a sufficient State role in the areas of determining ownership of cable systems; rate regulation; and establishment of resonable franchise fees.

A review of the provisions contained in Cannon-Hollings bill reveals that many of the NARUC's concerns addressed by Chairman Burke at the April 27 hearing have not been addressed in S. 2445. The NARUC's specific concerns with the Cannon-Hollings legislation are set forth in the following sections.

RECOGNITION OF STATE ROLE IN CABLE REGULATION

Section 601 of S. 2445, entitled "Findings," includes a recognition that "State and local governments" should be the entities which ensure the suitability and responsiveness of cable telecommunications to local communities and their needs [Section 601(3)]. Similarly, Section 602 would include among the "Purposes" of the Communications Act's new title the establishment of a "Federal policy for the provision of cable telecommunications," which is to be implemented, "to the maximum extent by State and local governments" [Section 602(5)].

More importantly, Section 604 of S. 2445, dealing with Federal-State division of responsibilities, would grant the Federal Communications Commission (FCC) authority to "oversee the implementation of the purposes and policies established" by the act, and where required, to define more specifically these purposes and policies. States or their political subdivisions, on the other hand, would be free to "adopt or continue in effect any law, order, rule, [or] regulation" concerning cable systems "which is not inconsistent with" the act's purposes and policies. In contrast to the exclusive grant of authority over cable to the FCC contained in S. 2172's provisions, S. 2445's preliminary language clearly contemplates a more active State role in cable regulation.

Although we applaud inclusion of these provisions in S. 2445, other sections of the bill would nonetheless decidedly undercut the effectiveness of State regulatory efforts aimed at tailoring local cable telecommunications services to the needs of the public. In this regard, the NARUC is particularly concerned with: (1) S. 2445's restrictive approach to State regulation of cable systems beyond basic service rate regulation (Sections 604 and 606); (2) its prohibition on State regulation of telecommunications facilities or services offered by cable operators other than local telephone companies (Section 609); (3) its Federal preemption of State authority with respect to certain aspects of cable system ownership and control (Section 605); and (4) its grant of authority to the FCC to establish ceilings on franchise fees levied by the States (Section 608). Each of these concerns is addressed in turn below.

LIMITATIONS ON STATE REGULATION

Notwithstanding Section 604's seemingly broad grant of authority to the States with respect to cable systems, Section 606(a) of the bill would limit State ratemaking authority to the establishment of nondiscriminatory rates for basic subscriber service, an approach which is even more restrictive than that embraced in S. 2172. Moreover, the remainder of Section 606 would create a procedure whereby a cable operator could ask the FCC to bar a State from exercising even this limited ratemaking authority, on the ground that "there exists effective competition for such service" in the relevant operating area.

The NARUC is vigorously opposed to these stringent limitations on State rate regulatory authority over cable system operations within their respective borders. In addition, we object to S. 2445's failure to state explicitly in either Section 604 or 606 that State jurisdiction over the full range of franchised cable system operations is to be construed as unrestricted by this Act to the greatest degree possible.

As was urged in President Burke's testimony regarding S. 2172, the States should retain a preeminent role in all matters concerning franchised cable systems, in view of the need for regulatory oversight which best reflects understanding of local community needs and circumstances. Knowledge concerning the legal, technical, financial and character qualifications of cable franchise applicants, for example, is uniquely within the province of State authorities. Similarly, States are best able to determine whether the granting of a franchise is in the public interest and whether any limitations on the franchise's conduct or duration are necessary.

Although it is conceivable that provisions of Section 604 could be interpreted as preserving State authority in these areas, the ambiguous language used would guarantee conflicting readings of its meaning. In particular, Section 604(c)'s direction that "the cable operator and the cable franchising authority shall jointly determine the amount and nature of basic service" (emphasis added) and other operational conditions in awarding the franchise would appear to place State authorities in an equal negotiating position vis-a-vis cable franchise applicants. Relegating the States to such a role would conflict with the State regulatory posture referenced in Section 604(b).

In order to rectify these perceived problems with respect to State jurisdiction over cable systems, the NARUC respectfully requests that S. 2445 be amended so as to reflect revisions similar to those we suggested in our previous testimony concerning S. 2172's Section 607.[1]

REGULATION OF TELECOMMUNICATIONS FACILITIES

S. 2445's Section 609 contains provisions which, if enacted, would place restrictions on State regulatory authority that have ramifications beyond the efficacy of cable regulation per se. Section 609 would bar all State regulation of telecommunications services or facilities offered by a cable operator who is not also a provider of local exchange telephone service," i.e., a local telephone company. Also prohibited would be State regulation of the resale or shared use of a cable operator's telecommunications facilities. This provision represents a major intrusion upon traditional State authority over local exchange telecommunications services, and the NARUC strongly recommends that it be deleted from this legislation.

If Section 609 were to become law, a potentially massive segment of the local exchange service providers would operate as on a completely unregulated basis—a result that conflicts with long-established policies embodied in the 1934 Communications Act. No viable justification exists for allowing such a scenario to occur. State-regulated local telephone utilities would be decidedly disadvantaged in competing against unregulated "cable telephone" companies, since their remaining subscribers would be forced to bear the costs of the utility's existing investment in telephone plant facilities. Likewise, the operation of unregulated telephone companies would threaten the ability of State public utility commissions to establish rate structures applicable to business and residential subscribers of local exchange service.

In light of this section's likely adverse impacts, the NARUC respectfully requests that S. 2445 be amended so as to eliminate Section 609 from the bill.[2]

OWNERSHIP AND CONTROL OF CABLE SYSTEMS

The NARUC appreciates the fact that S. 2445 would not prohibit the exercise of State regulatory authority over the ownership and control of cable systems, as would S. 2172. We also commend Senators Cannon and Hollings for choosing not to include in their bill a provision which would require State and local governments to pay no less than full market value for acquiring an ownership interest in a cable system. As noted in our statement regarding S. 2172, the latter requirement would represent a completely unnecessary duplication of protections provided by the U.S. Constitution, which forbids the taking of property without just compensation.

As currently drafted, S. 2445's Section 605 would impose two statutory rules governing ownership and control of cable systems. The first of these would prohibit a person from owning or operating a cable system and a television broadcast station in the same operating area unless the cable system carries all local television signals.

The second rule, and the one with which the NARUC is concerned, would prohibit a local exchange telephone company from also providing cable telecommunications services in the same operating area. This rule could be waived by the FCC if significant additional diversity and competition would thus result. In such cases, the Commission would be required to impose conditions which minimize anticompetitive practices. The rule would not apply to local telephone companies in rural areas that seek to provide cable telecommunications.

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[1] This amendment may be made in S. 2445 as follows:

(1) By revising Section 604 (c), page 8, lines 1-6, so as to read:

"(c) In awarding a cable franchise, after consulting with the cable operator, the cable franchising authority shall determine the amount and nature of basic service, the number of channels to be utilized for program origination and the minimum capacity of telecommunications facilities to be provided by the cable operator.";

(2) by inserting the following new subsection, designated as Section 604(e), after line 15, page 8:

"(e) Nothing in this title shall be construed as limiting the authority of Each State or political subdivision or agency thereof, or cable franchising authority, to:

"(a) Establish, fix or otherwise restrict the rates, on a nondiscriminatory basis, charged for the use or sale of cable service, channels, or facilities;

"(b) Regulate all aspects of franchise cable systems, including but not limited to payment of franchise operating territory, the duration of franchises, and any restrictions or conditions with respect to the conduct of such cable systems;

"(c) Establish technical service standards or regulations respecting the provision of public access channels;

"(d) Establish any other regulations deemed appropriate for the effective regulation of cable telecommunications systems and which are not incompatible with any other provision of this Act.";

(3) By striking out Section 606 and Section 610 in their entirety.

[2] This amendment may be made by striking out section 609 in its entirety.

The NARUC believes that State regulatory authorities, rather than the FCC, are best equipped to make determinations as to whether regulated local telephone companies should enter cable markets in their operating areas. Section 605's prohibition on such entry as well as its guidelines for FCC waiver of the bar reflect an awareness of potential problems which might ensue as a result of permitting a regulated entity with monopoly attributes to enter a line of business where its monopoly position could be unfairly used to the detriment of its competitors in the new business. In fulfilling their legal obligations, State regulators regularly exercise oversight powers analogous to those proposed in Section 605, in an effort to minimize problems of the same sort.

Moreover, local exchanges telephone companies are State-certified public uitilities whose business activities are directly regulated by State public utility commissions. It would contradict this regulatory scheme, recognized under both State and Federal statute, to allow the FCC to dictate when local telephone companies may partake of business opportunities in cable communications.

The NARUC therefore respectfully requests that Section 605 be amended so as to grant to the States authority to waive that section's prohibition on local telephone company cable entry.[3]

FRANCHISING FEE CEILINGS

Section 608 of S. 2445 would require the FCC to establish ceilings on State-set cable franchising fees. This provision is virtually identical to S. 2172's Section 611, which we argued in our previous statement should be deleted from that bill. The NARUC's position is the same with respect to Section 608 of the Cannon-Hollings bill.

Briefly restating the arguments presented on this issue in connection with S. 2172, the NARUC considers Section 608 to represent a substantial intrusion upon the conduct of the States' cable regulation schemes. Franchise fees are comparable to taxes imposed on other regulated entities to recoup some of the costs of regulating as well as the value of using public rights of way in operating their businesses. Federal prescriptions regarding these fees are no more permissible than is any other usurpation of the States' taxing power.

Furthermore, it is beyond dispute that consumers of a particular product, such as cable television service, are, in the final analysis, the group upon which any higher costs will fall. Franchise fees ultimately will be passed on to cable system subscribers, and the NARUC submits that this cost-pass-through effect will operate as a self-correcting restraint on the implementation of fees at unreasonably high levels. Any State that desires viable cable service within its borders will be forced to reckon with this reality.

Consequently, the NARUC supports revision of S. 2445 so as to eliminate the bill's delegation to the FCC of authority over franchise fee ceilings.[4]

CONCLUSION

Although its preliminary language purports to give State and local governments substantial control over the regulation of cable telecommunications, S. 2445's substantive provisions embody an approach that in some respects is even more restrictive in this regard than that favored by S. 2172. The NARUC therefore reiterates with renewed emphasis its basic position concerning cable regulation: State authorities are best situated to provide whatever government regulation is necessary to protect consumers of cable system services. For this reason, responsibility for regulating cable operations should be reserved to the States, with the exception of those interstate aspects of cable communications which are beyond effective State regulation. So that enactment of S. 2445 will accomplish this division of State and Federal authority over cable regulation, the NARUC urges adoption of the aforementioned amendments to this legislation.

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[3] This amendment may be made by striking out in subsections 605 (b)(1), (b)(2), (c)(1), and (c)(2) the word "Commission" and by inserting the following:

(1) in subsections 605(b)(1) and (b)(2), the words "State regulatory authority with jurisdiction over provision of such telephone exchange service", in lieu of the word "Commission";

(2) in subsections 605(c)(1), the words "State regulatory authority with jurisdiction over provision of local exchange telephone service within that State's borders", and in lieu of the word "Commission"; and

(3) in subsection 605(c)(2), the words "State regulatory authorities with jurisdiction over provision of local exchange telephone service", in lieu of the word "Commission".

[4] This amendment may be made by striking out Section 608 in its entirety.

BOARD OF ESTIMATE,
New York, N.Y., May 20, 1982.

Hon. BARRY GOLDWATER,
Chairman, Senate Subcommittee on Communications,
Russell Senate Office Building, Washington, D.C.

DEAR CHAIRMAN GOLDWATER: On April 27, 1982, I testified on behalf of New York City before your Subcommittee concerning S. 2172, the proposed Cable Telecommunications Act of 1982. During the hearings, the public was invited to submit written comments on another cable bill, S. 2445, introduced by Senator Hollings and Senator Cannon on April 27, 1982. This letter sets forth the City's comments on the provisions of S. 2445.[1] I respectfully request that these comments be made part of the record.

As a general matter, the City supports the broad purposes of S. 2445 to promote competition and to establish a framework for the regulation of cable television by federal, state, and local authorities. The City is particularly pleased that the bill, in its findings and purposes sections, appears to recognize the local jurisdictions can and should have a greater role in establishing standards and shaping policies that affect the provision of cable service to local residents.

The City respectfully suggests, however, that the underlying premise of the bill—that the existence of competition in the delivery of certain types of programming eliminates the need to regulate specific aspects of the cable industry—is subject to serious question. The City believes that governmental regulation at the local level is crucial, if cable is to develop into a national broadband communications system offering a full array of services benefiting the public.

As numerous witnesses made clear during the hearings of S. 2172, a state-of-the-art cable system offers more than just entertainment services. Cable can provide the means by which local governments and institutions deliver public services. The development of interactive capability makes possible a host of new services, including home banking, home shopping, home security, opinion polling, information retrieval, and teleconferencing. In addition, through institutional networks, cable can dramatically alter the ways in which government and institutions communicate and store and transfer information.

The existence of alternative means of delivering entertainment services cannot ensure the widespread availability of public services. Indeed, the fact that local governments have been unable to regulate the alternative service providers has often resulted in their failure to operate in the best interest of the public. In metropolitan areas, the purported "alternatives" to cable typically engage in the practice of "cream-skimming"; they select the more lucrative neighborhoods or buildings, leaving less affluent areas without service. Moreover, the limited capacity of the "alternative" service suppliers—and the fact that they are limited to one-way entertainment programming—often results in hundreds or potentially thousands of people being deprived of the full benefits of the new broadband technology.

Federal legislation should not require local governments to abandon their regulatory responsibility to protect the public interest, under the guise of promoting competition. As the City commented with respect to S. 2172, we believe that the best approach to achieving national and local policy goals in the regulation of cable television is to authorize the Federal Communications Commission (FCC) to adopt minimum standards and to permit local jurisdictions to establish more rigorous protections where appropriate.

The balance of this letter contains the City's detailed comments on a section-by-section basis.

SECTION 604. FEDERAL-STATE RESPONSIBILITIES

Local authorities are permitted to adopt or continue in effect any law, order, rule, regulation, or standard that is "not inconsistent with" the purposes of the bill. The City urges that this language be modified to make clear that local authorities and cable operators may agree to stricter requirements than those provided in the bill. In addition, it should be clear that municipalities and cable operators can reach a good-faith agreement not only with respect to basic service, channel capacity for program origination, and minimum capacity of telecommunications facilities, as provided in Section 604(c), but also with respect to other matters affecting cable service.[2]

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[1] I have also sent these comments directly to Senator Cannon and, at Senator Cannon's request, to Thomas Cohen, a minority staff member of the Senate Commerce Committee.

Although one of the stated purposes of the bill is to preserve existing cable franchise agreements (Section 602(b)), the bill provides inadequate protection for such agreements. For example, the City is currently negotiating franchise agreements for the Boroughs of the Bronx, Brooklyn, Queens, and Staten Island. It is contemplated that those agreements will be in existence for a term much longer than the maximum five-year grace period under Section 640(d). Federal legislation should respect the integrity of agreements reached between municipalities and cable operators.

SECTION 605. OWNERSHIP OF CABLE SYSTEMS

The City believes that local authorities should be able to establish cross-ownership restrictions that differ from those set forth in the bill. The bill eliminates the FCC's existing rules prohibiting cable ownership by television networks and local broadcasters and substitutes a provision that would permit local broadcasters to own cable systems if those systems carried all local signals. While the City supports the principle that cable systems should carry all local signals,[3] the City believes that local authorities should be able to choose to continue in effect policies which promote greater diversification of the communications industry. It is anomalous that this bill—which contains a number of provisions premised on the growth of competition—should also contain a provision that may encourage a trend toward concentration of control.[4]

SECTION 606. RATE REGULATION

Section 606 authorizes local jurisdictions to regulate basic service rates only to ensure that such rates are nondiscriminatory. Local jurisdictions may not even exercise that limited authority if the FCC determines that there exists "effective competition."

These provisions severely restrict the ability of local jurisdictions to ensure that cable services are available to a broad cross-section of the community at reasonable rates. Moreover, Section 606 represents a substantial departure from existing law, which recognizes the authority of local jurisdictions to regulate the entry level charges for basic services.

Significantly, Section 606 would preclude local authorities from expecting cable operators to offer certain basic services to all residents of the community at affordable rates. In addition, Section 606 would not permit local authorities to require that cable operators charge reasonable and non-discriminatory rates for leased channel time, use of equipment and facilities, and other service-related activities.

The City's authority to regulate basic rates should not be removed because there may exist—in the minds of particular commissioners at a given time—alternatives to the cable system. The existence of "reasonably available" service alternatives cannot substitute for regulation of rates in the public interest. Public services are an integral part of cable services. The cable operator should not be the sole determinant of the price at which subscribers can buy public services.

Moreover, alternative services do not compete with cable systems in the provision of basic services; competition is confined largely to the provision of entertainment services. In the absence of government rate regulation, subscribers may be forced to subsidize cable's commercial entertainment services by payment of artificially high basic service rates.

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[2] It should be noted that the definition of "basic service" restricts the ability of franchising authorities to require that basic service include a broad range of services. Read together, Sections 603(1) and (14) define basic service as one-way video and audio programming via the retransmission of broadcast signals and channels used for public, governmental, and educational programming. This definition excludes a number of services that should be, and currently are, included within basic service.

[3] It should be noted that the FCC currently has in effect mandatory signal carriage rules which require cable systems to carry all local broadcast signals. (See 47 C.F.R. §§ 76.57–76.61.)

[4] Observers have already noted the trend toward "bigness" and concentration of control in the cable industry. "What the success of the last three years has bred is an increasing centralization. Medium-sized systems have gobbled up the small mom-and-pop operations that started the industry 30 years ago to provide a clearer television image, and the medium-size systems have, in turn, been gobbled up by bigger systems." "Cable TV Sees More Centralization," the New York Times at C26 (May 6, 1982).

SECTION 607. CARRIAGE OF LOCAL BROADCAST SIGNALS

The City supports the principle that there should be FCC rules to prevent cable systems from interfering with receipt of local broadcast signals. The City believes that the mandatory signal carriage rules of the FCC, which are designed for this purpose, should be preserved.[5]

SECTION 608. FRANCHISE FEES

Section 608 of the bill authorizes the FCC to establish limitations on the amount of the franchise fee which cable operators pay to state and local jurisdictions. The City believes that the franchise fee to be paid for the use of its streets is a matter for negotiation between the City and cable applicants. The streets of the City are a valuable resource, and the City should have the right to obtain a fair and reasonable price for their use. The federal government should not preclude the City from negotiating in good faith reasonable franchise fees with cable operators.

Section 608 appears to contemplate that the FCC will fix more than one fee ceiling, which suggests that the ceilings may vary among different states or cities. If the FCC adopts a sliding scale for franchise fees, the FCC would be in a position of evaluating local conditions—such as the value of the streets, services to the public, and the regulatory program that the locality intends to implement—in order to determine the appropriate fee. The City believes that local jurisdictions are in a far better position to make such evaluations and judgments.

A fixed federal franchise ceiling applicable uniformly to all jurisdictions would also raise similar problems, for the same reasons that local jurisdictions have different needs and requirements, which they are well-qualified to determine.

It is difficult to understand the rationale for authorizing the FCC to adopt any type of ceiling at this time. Based on the FCC's experience with existing fee limitations, the FCC initiated a proceeding to consider the repeal of the restriction over three years ago. At that time, the FCC publicly stated that "there remains a serious question about . . . the desirability of a federal limitation on franchise fees. . . ."[6]

Clearly, the make-up of the industry has changed dramatically since the FCC first determined to impose its fee limitations. The concept of fee ceilings grew out of a desire to protect an infant industry from the unreasonable demands of franchising authorities. Without such protection, it was argued, the industry would be drained of the necessary capital to ensure its growth. Today, cable is no longer in the incipient stages of its development. To be sure, the industry is still maturing. However, major U.S. corporations are now heavily involved and are the leading interests in the industry. Cable no longer needs the protective barriers erected by the federal government a decade ago.

SECTION 609. TELECOMMUNICATIONS FACILITIES

The City believes that the restrictions of Section 609 are overbroad. Section 609 effectively strips local authorities of any right to enter into good-faith agreements with cable operators concerning any of the terms and conditions under which services will be offered to subscribers and facilities made available to third party programmers, including leased users and the public.[7] In short, Section 609 precludes francising authorities from having any input into those issues which may be of greatest importance to its citizens. Under Section 609, the City could not even require cable operators within the City to provide intra-Borough, inter-Borough, or Citywide interconnection of their systems. Section 609 plainly guts the intent expressed in Section 601 that state and local authorities must ensure that cable telecommunications are suitable for and responsive to local needs and conditions.

The City suggests that the filing of a petition with the FCC is not an efficient mechanism to ensure nondiscriminatory access to services and facilities. To establish such a procedure at the federal level would inevitably result in substantial delays in corrective action at the local level. Furthermore, the standards set forth in the bill by which the FCC would make a determination regarding access are extremely rigorous and difficult to prove.[8]

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[5] In its comments on S. 2172, the city also suggested that it may be appropriate to require local broadcasters to pay to cable operators their fair share of the costs of signal carriage pursuant to the FCC's rules. At present, these costs are borne by subscribers. Payment of such costs by the broadcasters could serve to avoid the indirect subsidy of commercial enterprises which now results from the FCC rules.

[6] 71 FCC 2d 569 at ¶ 34 (1979).

[7] As the city commented with respect to S. 2172, the city supports the principle that the Federal Government should establish minimum standards for the channel capacity of cable systems that must be allocated to public, education, governmental, and leased uses.

SECTION 610. EFFECTIVE COMPETITION OF SERVICES

Section 610 defines "effective competition" as the reasonable availability of alternative services. The effect of section 610 and Section 606 is to prohibit local authorities from regulating cable service rates if there are alternative service providers. The City's views regarding alternative services have already been discussed in the context of Sections 606 and 609. Alternative service providers do not offer the same range of services as do cable systems and they generally do not offer service to all residents of a particular jurisdiction. As we explained above, the existence of alternative services does not protect the public interest and therefore should not provide the basis for deregulation of cable.

SECTION 611. PROTECTION OF SUBSCRIBER PRIVACY

The City supports the protection of subscribers' right to privacy. In addition, the City believes that it is in the best interest of subscribers to permit local authorities to prescribe additional privacy requirements not inconsistent with federal standards.

The City also suggests that Section 611 be modified to permit local franchising authorities to have access to such subscriber information as is necessary to perform local regulatory functions.

EQUAL EMPLOYMENT OPPORTUNITY

In addition to FCC requirements, the City believes that local jurisdiction should not be prohibited from developing such EEO policies as may be necessary or appropriate for local conditions.

NEW AND ADDITIONAL SERVICES

The City endorses the principle that the FCC should encourage the introduction of new services. The City believes, however, that the FCC should have flexibility to define the public interest broadly and should not be limited to a consideration of technical factors only. The City further believes that local authorities should also have the opportunity to ensure that such new services serve the public interest as broadly defined.

SIGNAL PIRACY

The City supports the strengthening of remedies available against unauthorized interception of signals.

ADDITIONAL RECOMMENDATIONS

In connection with my testimony on S. 2172, I advanced specific recommendations for congressional action with respect to two key areas, not covered by S. 2172, which directly affect the growth and development of cable telecommunications. I believe that those recommendations should be considered in the context of S. 2445 as well. Specifically, I recommended that Congress consider legislation that (1) would exempt municipalities from the antitrust laws with respect to franchising decisions, and (2) would establish, or permit local authorities to establish, reasonable restrictions on the ability of multiple dwelling owners to extract payments from cable operators as a condition to providing requested services to residents of such buildings. The bases for these recommendations are fully set forth in my testimony dated April 27, 1982, at pp. 17-22.

I would be pleased to discuss further my comments on S. 2445 and S. 2172 with you, members of the Subcommittee, or the Subcommittee's staff at your convenience. I can be reached either at the address and phone number which appears at the top of this letter, or through James Cott, of New York City's Washington office, at 223-6694.

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[8] For example, the petitioner would be required to establish that the cable operator refused access for anticompetitive purposes. (See Section 609(c)(2).)

In addition, the fact that there are other means of delivering services may not be a meaningful standard, since such alternatives may not provide programers with the opportunity to reach a similar subscriber audience. (See Section 609(c)(4).)

Sincerely,

Morris Tarshis,
Director, Bureau of Franchises,
New York City.

Office of the Mayor and City Council,
Scottsdale, Ariz., May 19, 1982.

Mr. Gordon Fink,
Professional Staff Member, Senate Commerce Committee,
Washington, D.C.

Dear Mr. Fink: The purpose of this letter is to submit comment on Senate Bill 2445, the "Cable Telecommunications Competition and Deregulation Act of 1982." These comments are submitted at the request of Senator Howard Cannon.

This bill, like Senate Bill 2172, represents an excellent starting point for discussion of a National Cable Policy. In particular, I think the "Findings" and "Purposes" sections of this bill are excellent. Section 601, Findings, states: "State and Local Government must ensure that Cable Telecommunications are suitable for and responsible to the needs of the local community." This statement accurately reflects what cities have realized for years—that cable television is a local telecommunications network that is capable of responding to the unique needs and challenges of each community.

Section 602, Purposes, states: "The purposes of this title are to . . . establish a Federal policy for the provision of cable telecommunications, and to provide for the implementation of such policy to the maximum extent by State and local governments." This statement accurately reflects what I consider to be a proper division of responsibility—that a National Cable Policy focus on areas of national concern, and that local government be responsible for the regulation of the cable system, in accordance with a contract arrived at through negotiation and mutual agreement. Such a division of authority would allow local cable systems to be responsive to local needs and concerns, without the necessity of turning to Federal regulators for decisions concerning a local cable system.

It is my opinion, however, that the body of S. 2445 does not implement the intent of the bill as stated in the Findings and Purposes sections. I have some specific comments on various sections of this bill, but first it is important to make some general comments about the concept of "effective competition" for cable television services.

The cable industry would have us believe that there are a number of competitors for the provision of CATV services—MDS, STV, SMATV, DBS, Video Discs and Video Tape Recorders. I disagree. Each of those technologies is capable of competing in a limited way with the "pay television" services that are offered over a cable system. Each of those technologies, however, is limited in size, offers a limited number of channels, and offers no interactive potential to the subscriber. Only cable television can offer a subscriber 60 downstream channels, and 5 upstream channels, over a single cable. Only cable television can offer the subscriber the potential for shop-at-home, bank-at-home, emergency alert, intrusion protection, fire detection, medical alert, data transmission, text retrieval, access to National Data Banks, energy load management . . . the list is almost endless, and it is just beginning.

Therefore, it is my considered opinion that cable television represents a superior technology, and one which is protected by franchise rights from competition by an identical (cable) technology. Cable systems face limited competition from inferior technologies for a limited portion of their services. That does not, in my mind, represent "effective competition." I therefore urge the Senate to carefully consider alternative technologies, and the limited capability of such technologies, before such technologies are labeled as "effective competition" to cable TV, and before decisions are made on a National Cable Policy.

I have some specific comments about various sections of this bill, as follows:

1. *Section 606, Rate Regulation.*—This section grants authority to a political subdivision to regulate rates for basis services, unless the Commission has determined that there exists "effective competition" for such service in the operating area. It is my opinion, first, that rate regulation should not be confined to basic service. I am not concerned about rates for premium pay channel service, but I am very concerned about rates for leased access, for data transmission, and for any other service for which cable represents a virtual monopoly carrier.

Rate regulation is required to protect citizens from unreasonably high rates. There is no excuse for Government to grant a monopoly to a particular technology, and then refuse to recognize the monopoly characteristics inherent in the pricing structure of service delivery from such a technology. Additionally, it strikes me as needless duplication to give the Commission the authority to determine whether or not "effective competition" exists. Should the Scottsdale Cable System be faced with effective competition for any portion of its services, the Scottsdale City Council would certainly take that into account and allow the marketplace to set rates. We do not relish the responsibility inherent in rate regulation, we wish simply to protect our citizens from unreasonably high rates. Federal law should not prohibit our citizens from receiving such protection.

2. *Section 609, Telecommunication Facilities.*—This section prohibits any state or political subdivision from regulating telecommunications facilities, including the requirement for interconnections, for guaranteed access by competing users, or rate regulation. For your information, the Scottsdale Cable System will include a 130 mile institutional network, built to 450 MHz, which shall be used solely for telecommunication facilities. In order to develop an effective regional telecommunications network, it is imperative that such facilities be interconnected. Prohibiting cities from making such a requirement is short-sighted. Nevertheless, the bill goes on to recognize that—in the absence of local regulatory oversight—it would be possible for a cable operator to deny access to telecommunications facilities users and service providers. The recourse in that case, according to S. 2445, is to petition the Commission to obtain access. Why in heavens name does the Federal Government want to undertake such a regulatory responsibility? Why not allow local government to ascertain whether or not a cable operator is offering telecommunications facilities on a reasonable and nondiscriminatory basis, and make regulatory judgements based on such an ascertainment? Because each community's telecommunications needs are different, decisions in each community will be different. The rigid, formalized approach to decision making required at the Federal level would be time consuming, expensive, and duplicative. I suggest it would also be ineffective.

3. *Section 610, Effective Competition of Services.*—This section states that "the provision of a service offered by a cable telecommunications system shall be considered to be subject to effective competition, if there is a reasonably available alternative to such service." To my way of thinking, a "reasonably available alternative" is not necessarily a competitive alternative. For example: are private security patrol services a competitive alternative to a security service offered via cable, hooked up to a central monitoring station? Are movie theatres a competitive alternative to premium pay channels, offered via cable? How else but over cable will you receive 24-hour sports, 24-hour news coverage, local coverage of high school football games, and broadcast coverage of local events of community importance? Is one hour of network news a competitive alternative to a 24-hour news channel?

I suggest that the definition of what constitutes effective competition be reconsider, that cable television be recognized as a superior technology, and that the monopoly characteristics inherent in cable television be acknowledged.

4. *Section 611, Protection of Subscriber Privacy.*—This is an excellent section, and a proper subject for a National Cable Policy. I would suggest, however, that—should a subscriber grant written consent for the collection of information—the subscriber should have the right to require destruction of such information upon the termination of his written authorization that such information be collected. It is my opinion that subscriber privacy should be protected at all costs, and that control of such information should remain with the individual.

5. *Section 7, New and Additional Services.*—This section seems to imply that all new or additional services must be approved by the Commission before such services may be introduced over a cable system. I wonder why. It seems to me that the exciting potential of cable television technology lies in its ability to offer services which are as yet unproven—and perhaps as yet unthought of. Why should Federal Law require the enterprising entrepreneur to subject himself to Federal approvals before new services may be offered, even on an experimental basis? It is interesting to note that S. 2445 grants the Commission six months to review and approve new or additional services. I am quite confident that, at least in Scottsdale, we would provide far greater encouragement for new and experimental services, would applaud the cable company for their innovative spirit, and would not hold them up for six months while we reviewed such requests.

In summary, I think that S. 2445 grants extraordinary powers and regulatory authority to the Commission, at the expense of both local regulation and the cable industry. Local cable regulation offers the opportunity for Americans to do what they do best—to innovate, to try a different approach, to search for the best. Each community is different, each community's needs and priorities are different, and local cable regulation allows such differences to surface and be reflected.

Local cable regulation is regulation by contract, arrived through negotiation and mutual agreement. Federal cable regulation is regulation by edict. It is time consuming, bureaucratic, costly and unresponsive. I think in an era of Federal deregulation, this bill moves the Nation in the wrong way.

I suggest that a National Cable Policy focus on areas of national concern, and I suggest that there are four: 1) protection of individual rights; 2) ownership restrictions and guidelines; 3) ensuring a diversity of information by establishing minimum requirements for community access to the system; and 4) promoting the development of nonentertainment services, such as home security and energy load management, and prohibiting the cable operator from monopolizing the cable system for the delivery of such services.

Thank you for the opportunity to submit comments with regard to Senate Bill 2445. I think the task before you is one of National importance, and I look forward to the continuing discussion over the formulation of a National Cable Policy. If I may be of any assistance, please let me know.

Sincerely,

HERBERT R. DRINKWATER,
Mayor.

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